No. 06-11429
Title: Keith Lavon Burgess, Petitioner
v.
United States
Docketed: May 23, 2007
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (04-4997)
Decision Date: March 12, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 17 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 22, 2007)
May 30 2007	Waiver of right of respondent United States to respond filed.
Jun 6 2007	DISTRIBUTED for Conference of June 21, 2007.
Jun 18 2007	Response Requested . (Due July 18, 2007)
Jul 11 2007	Order extending time to file response to petition to and including August 17, 2007.
Aug 16 2007	Brief of respondent United States in opposition filed.
Aug 28 2007	Reply of petitioner Keith Lavon Burgess filed. (Distributed)
Aug 30 2007	DISTRIBUTED for Conference of September 24, 2007.
Nov 15 2007	DISTRIBUTED for Conference of November 30, 2007.
Dec 3 2007	DISTRIBUTED for Conference of December 7, 2007.
Dec 7 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Dec 13 2007	Motion to appoint counsel filed by petitioner Keith Lavon Burgess.
Dec 19 2007	Motion DISTRIBUTED for Conference of January 11, 2008.
Jan 14 2008	Motion to appoint counsel filed by petitioner GRANTED. Jeffrey L. Fisher, Esquire, of Stanford, California, is appointed to serve as counsel for the petitioner in this case.
Jan 17 2008	Motion to dispense with printing the joint appendix filed by petitioner Keith Lavon Burgess.
Jan 22 2008	SET FOR ARGUMENT ON Monday, March 24, 2008
Jan 22 2008	Brief of petitioner Keith Lavon Burgess filed.
Jan 29 2008	Brief amici curiae of National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums filed.
Feb 5 2008	CIRCULATED.
Feb 5 2008	Record received from U.S.C.A. for the 4th Circuit. (1 envelope)
Feb 8 2008	Record receivedf from the U.S.D.C. for the District of South Carolina. (1 envelope)
Feb 19 2008	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Feb 21 2008	Brief of respondent United States filed. (Distributed)
Mar 17 2008	Reply of petitioner Keith Lavon Burgess filed. (Distributed)
Mar 24 2008	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. (Appointed by this Court.) For respondent: Nicole Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

TB.

No. 0611429

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAY 17 2007
OFFICE OF THE CLERK

KEITH LAVON BURGESS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Court of Appeals - Fourth Circuit @ Richmond

United States District Court - District of South Carolina

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Keith Burgess
(Signature)

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SUPREME COURT, U.S.

No. 0611429

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

KEITH LAVON BURGESS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
MAY 17 2007
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

P E T I T I O N

FOR A WRIT OF CERTIORARI

Petitioner:

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Post Office Box 699
Estill, South Carolina 29918

On the Brief:

MICHAEL R. RAY, Law Clerk
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QUESTION(S) PRESENTED

1. Whether the term "felony drug offense" as used in federal statute requiring imposition of enhanced mandatory minimum 20 years' imprisonment when drug offender has "prior conviction for a felony drug offense" must be read in pari materia with federal statutes defining both "felony" and "felony drug offense", so as to require imposition of minimum 20-year sentence only if prior drug conviction is both punishable by more than one year in prison and characterized as a felony by controlling law.

2. When the court finds that a criminal statute is ambiguous, must it then turn to rule of lenity to resolve ambiguity?

LIST OF PARTIES

1. Petitioner/Appellant: KEITH LAVON BURGESS, pro se, Register Number 93479-071, Federal Correctional Institution, Post Office Box 699, Estill, South Carolina 29918-0699.

2. Respondent/Appellee: UNITED STATES OF AMERICA, Arthur B. Parham, Esq. Office of the U.S. Attorney, Post Office Box 1567, Florence, South Carolina 29503-1567.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix "A" to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit decided this case was March 12, 2007. No petition for rehearing was filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 102(13,44), 401(b)(1)(A), as amended.

2. 21 U.S.C.A. §§ 802(13,44), 841(b)(1)(A).

3. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, tit. IX, § 90105, 108 Stat. 1796, 1987-88.

STATEMENT OF THE CASE

The Petitioner is one of two Defendants named in a two count indictment filed in the District of South Carolina on January 8, 2003. The charges allege that in or about October of 2002 and continuing thereafter, up to and including the date of the indictment, in the District of South Carolina and elsewhere, the Defendants Keith Lavon Burgess, a.k.a "Black" and Ronald Carl Soares did knowingly and willfully combine and conspire and agree and have a tacit understanding with each other and various other persons, both known and unknown to the Grand Jury, to unlawfully possess with intent to distribute and distribute 50 grams or more of cocaine base, commonly known as "crack" cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), all in violation of and 21 U.S.C. § 846. Count two is a substantive count that on or about December 17, 2002, in the District of South Carolina, the Defendants, Keith Lavon Burgess, a.k.a. "Black" and Ronald Carl Soares, knowingly, intentionally, and unlawfully did possess with intent to distribute and did distribute 50 grams or more of cocaine base, commonly known as "crack" cocaine, a schedule II controlled substance and did aid and abet each other in the commission of the aforesaid offense, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2.

On February 2, 2003, an Information was filed by the Assistant United States Attorney, pursuant to 21 U.S.C. § 841 to increase the Petitioner's mandatory minimum from 10 years to 20 years. On March 22, 2003, the Petitioner appeared in the United States District Court in Florence, South Carolina and entered a plea of guilty to count one of the indictment before the Honorable Terry L.

Wooten, United States District Court Judge. The Pre-Trial Services Report, dated May 10, 2003, was prepared. On April 20, 2004, Assistant United States Attorney A. Bradley Parham advised the Probation Office that an Information had been filed with the District Court pursuant to 21 U.S.C. § 851 to enhance the Petitioner's statutory mandatory minimum to 20 years. On April 20, 2004, the Presentence Investigation Report was revised by the Probation Officer. On May 5, 2004, the Petitioner objected to ¶¶'s 74 and 75 of the Revised Presentence Investigation Report in which the mandatory minimum term of imprisonment was increased to 20 years pursuant to 21 U.S.C. § 851. Thereafter, on May 12, 2004, the Petitioner filed an additional objection to the 21 U.S.C. § 851 enhancement. On June 10, 2004, the Probation Officer issued a revised addendum to the Presentence Investigation Report responding to the Petitioner's objections.

At sentencing, the Court overruled Petitioner's objection to the application of 21 U.S.C. § 851 which increased the mandatory minimum to 20 years.

The Petitioner received a downward departure at sentencing due to substantial assistance pursuant to United States Sentencing Guidlines § 5K1.1. The Petitioner was sentenced, pursuant to the United States Sentencing Guidelines, to a sentence of 156 months to run consecutive to his supervised release violation.

Petitioner filed a direct appeal, citing this issue to the Fourth Circuit Court of Appeals at Richmond. On March 12, 2007, a three judge panel of that court issued a published opinion, authored by Judge Shedd, in which they affirmed the conviction and sentence. This instant petition for writ of certiorari is the result of that decision.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(a) allows review on a writ of certiorari when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. In the case at bar, the Petitioner clearly shows that the Fourth Circuit Court of Appeals has issued just such a decision. The United State Court of Appeals for the DC Circuit issued a completely opposite decision on January 7, 2005 in the matter of U.S. v. West, 393 F.3d 1302. In the instant case, the Fourth Circuit basically found that the statutory language was not ambiguous. Looking at both the language and structure of the VCCLEA, the Petitioner contends that § 841(b)(1)(A) must be construed by reference to both § 802(13) and § 802(44). Petitioner argues that § 841(b)(1)(A) plainly refers only to "felony" drug convictions, so the definitional provision under both § 802(13) and § 802(14) appear to apply. The Petitioner would also remind this Court that, under well-established case law, a court must always strive to interpret statutes to give meaning to all provisions and to achieve coherent and consistent results. Following these principles, the Petitioner argues that the phrase "prior conviction for a felony drug offense" in § 841(b)(1)(A) must be read in pari materia with the definition of "felony" in § 803(13) and the definition of "felony drug offense" in § 802(44). Pursuant to this reading, the 10-year § 841(b)(1)(A) enhancement applies only when a defendant's prior conviction is (1) classified as a felony by applicable state or federal law and (2) punishable by more than a year in prison.

To resolve this circuit conflict, this Court must first decide whether the 1994 amendments manifest an unambiguous intent on the part of Congress to broaden the applicability of the disputed enhancement provision. If you find the statute ambiguous on this point, the Court must turn to the rule of lenity to resolve the dispute. See Whalen v. U.S., 63 L.Ed.2d 715. This is so because, in the criminal context, (your) assessment of the meaning of any particular statute is informed by "two policies that have long been a part of our tradition." United States v. Bass, 404 U.S. 336.

This Court must decide that "fair warning...be given... in language that the common world will understand, of what the law intends to do if a certain line is passed." Id. (quoting McBoyle v. United States, 283 U.S. 25,27 (1931)). "Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community" we require that legislatures, not courts, define criminal activity. Bass, 404 U.S. at 348. In short, Congress must be precise in providing fair notice of the specific criminal activity that is prohibited, as well as the punishment that will be imposed if the prohibition is violated. These policies find expression in the rule of lenity. This Court has emphasized that the touchstone of the rule of lenity is statutory ambiguity. Bifulco v. United States, 447 U.S. 381.

The question at hand is not simply whether the language of § 802(44) defines "a prior conviction for a felony drug offense", but rather, whether there is any language in that or any other provision of the Act plainly stating that § 802(44) alone gives meaning to those words as they are used in § 841(b)(1)(A). There is not. To the extent that this argument persuades you that the matter is not entirely free of doubt, the doubt must be resolved in favor of

lenity." Whalen.

In these circumstances -- where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in the [Petitioners] favor." United States v. Granderson, 511 U.S. 39.

In the case at bar, a ruling in favor of the Petitioner is required, not only to resolve this case, but to provide guidance and clarity to the other Circuits and the public at large. At present, the statute(s) are much less than clear on the subject, which has created the circuit conflict at hand.

After the application of "every thing from which aid can be derived, [you are] still left left with an ambiguous statute." Chapman v. United States, 500 U.S. 453.

In the face of such grievous ambiguity, the more lenient interpretation controls.

CONCLUSION

The petition for writ of certiorari should be granted, and counsel should be appointed to represent this Petitioner to present oral argument to this Court.

Respectfully submitted,

Dated: May 20, 2007

By: Keith Burgess

KEITH LAVON BURGESS, pro se
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On the Brief:

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PROOF OF SERVICE

I, KEITH LAVON BURGESS, do swear that on this the 17 day of May, 2007, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, and on every other part required to be served, by depositing an envelope containing the above documents in the United States Mail, properly addressed to each of them, with First Class Mail postage prepaid, addressed as follows:

Mr. A. Bradley Parham, Esq.
Assistant United States Attorney
Post Office Box 1567
Florence, South Carolina 29503-1567

I declare under the penalty of perjury that the foregoing is true and correct, in accordance with 28 U.S.C. § 1746.

Executed on May 17, 2007

By: Keith Burgess
KEITH LAVON BURGESS

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
AUG 16 2007
OFFICE OF THE CLERK

No. 06-11429

IN THE SUPREME COURT OF THE UNITED STATES

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
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QUESTION PRESENTED

Whether a state drug offense that is not classified as a felony under state law, but is punishable by more than one year of imprisonment, is a "felony drug offense" for purposes of the sentencing provisions of 21 U.S.C. 841(b)(1)(A).

IN THE SUPREME COURT OF THE UNITED STATES

No. 06-11429

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 478 F.3d 658.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2007. The petition for a writ of certiorari was filed on May 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of South Carolina, petitioner was convicted of

conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846. He was sentenced to 156 months of imprisonment, to be followed by ten years of supervised release. C.A. App. 65-66. The court of appeals affirmed. Pet. App. A1-A7.

1. In October 2002, a Drug Enforcement Agency confidential source (CS) spoke with petitioner about the purchase of some "tint" for petitioner's vehicle, and petitioner asked the CS if he needed any cocaine. Presentence Report (PSR) ¶ 9. The CS asked what the purchase price was for "half a big" -- i.e., 2.25 ounces -- and petitioner replied that he would sell the CS that amount of either powder cocaine or crack cocaine for $1,700. Ibid.

A few days later, the CS met petitioner again. PSR ¶ 10. Petitioner showed the CS that he had four ounces of powder cocaine and four ounces of crack cocaine in the truck of his sister's car, and he told the CS to call him whenever he was ready to make a purchase. Ibid. Petitioner explained that his source of supply was a Jamaican from Miami, Florida, whom petitioner had met in prison. Id. ¶ 11. Petitioner also told the CS that he sold or otherwise distributed more than five kilograms of cocaine and crack cocaine per week. Ibid.

In December 2002, in a controlled, monitored, and recorded call to petitioner's cell phone, the CS inquired about purchasing nine ounces of crack cocaine for $6,500. PSR ¶ 12-13. Petitioner

and the CS made arrangements to meet the following day in the parking lot of a shopping mall in Florence, South Carolina. Id. ¶¶ 13-14. The next day, petitioner and a co-defendant met the CS in the mall parking lot, and then left to go to petitioner's apartment to get the crack cocaine, saying they would return in 20 minutes. Id. ¶ 15. After 45 minutes, the CS called petitioner, and petitioner said they were still "cooking" the cocaine into crack. Id. ¶ 16. About an hour later, petitioner returned to the mall parking lot and consummated the drug deal, providing the CS with two Ziploc bags containing 240.3 grams of cocaine base. Id. ¶¶ 16-17.

2. A federal grand jury returned a two-count indictment charging petitioner and a co-defendant with conspiracy to possess with intent to distribute and to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846 (Count One), and possession with intent to distribute and distribution of 50 or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. 2 (Count Two). C.A. App. 9-12. The government subsequently filed an information pursuant to 21 U.S.C. 851, providing notice of its intent to seek increased punishment because of petitioner's prior conviction for a felony drug offense. C.A. App. 13; see 21 U.S.C. 841(b)(1)(A) (increasing mandatory minimum sentence from ten to 20 years when defendant has previously been convicted of a felony drug offense).

Petitioner previously had been convicted in a South Carolina state court for possession of cocaine, in violation of S.C. Code Ann. § 44-53-370(d)(1). Pet. App. A3. That offense was punishable by up to two years in prison but was categorized as a misdemeanor under state law. Ibid.

Petitioner pleaded guilty to Count One of the indictment. C.A. App. 14-20 (plea agreement). At sentencing, the district court determined that the advisory Sentencing Guidelines range was 151 to 188 months and that petitioner's conviction carried a statutory 20-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A) and 846. See id. at 39-40, 45, 47. The court rejected petitioner's argument that, because South Carolina law categorized his prior drug offense as a misdemeanor, his previous state conviction was not a "felony drug offense" for purposes of Section 841(b)(1)(A). The court explained that 21 U.S.C. 802(44) defines a "felony drug offense" as a drug offense punishable by more than one year of imprisonment. See id. at 34-35. Because it was undisputed that petitioner's state drug offense was punishable by up to two years of imprisonment, the court concluded that the enhancement applied. Id. at 32-40. Petitioner argued that the phrase "felony drug offense" is ambiguous because the statute contains a separate definition of "felony" in 21 U.S.C. 802(13), which requires that the offense be "classified by applicable Federal or State law as a felony." The court reasoned, however

that "felony drug offense" is the specific "term of art" used in Section 841(b)(1)(A). C.A. App. 35. The court then granted the government's motion for a downward departure based on substantial assistance and sentenced petitioner to 156 months of imprisonment. Id. at 53-61; Pet. App. A3-A4.

3. The court of appeals affirmed, holding that the district court did not err in applying the 20-year mandatory minimum sentence. The court noted that the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., defines "felony drug offense" in "plain and unambiguous terms" as "'an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.'" Pet. App. A5 (quoting 21 U.S.C. 802(44)). Adopting the reasoning of the First Circuit in United States v. Roberson, 459 F.3d 39 (2006), cert. denied, 127 S. Ct. 1261 (2007), the court concluded that "[b]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." Pet. App. A5 (qucting Roberson, 459 F.3d at 52); see also ibid. (citing Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979) (a statutory definition "which declares what a term means * * *

excludes any meaning that is not stated" (internal quotation marks omitted))).

The court noted that the CSA separately defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony," Pet. App. A3 (quoting 21 U.S.C. 802(13)), but "discern[ed] no basis from the plain language or statutory scheme of the CSA to indicate that Congress intended 'felony drug offense' also to incorporate the definition in 21 U.S.C. 802(13)," id. at A6. The court rejected petitioner's attempt to invoke the rule of lenity, finding that the rule had no application in cases, like this one, where there is "no 'grievous ambiguity or uncertainty' in the pertinent statutes." Ibid. (quoting Muscarello v. United States, 524 U.S. 125, 138-139 (1998)).

ARGUMENT

Petitioner contends (Pet. 5-6) that the court of appeals erred in determining that a state drug offense that is not classified as a felony under state law, but is punishable by more than one year of imprisonment, may qualify as a "felony drug offense" for purposes of the sentencing provisions of 21 U.S.C. 841(b)(1)(A). He argues (Pet. 5) that certiorari is warranted to resolve a conflict between the D.C. Circuit and the First and Fourth Circuits (the only three that have addressed the issue) on this question. The court of appeals' decision is correct, and review is not warranted at this time.

1. The CSA provides that a person who is guilty of possession with intent to distribute 50 grams or more of a mixture or substance containing cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life." 21 U.S.C. 841(b)(1)(A). If the defendant "commits such a violation after a prior conviction for a felony drug offense has become final," however, the statute increases the minimum sentence to "not less than 20 years." Ibid. The definitional section of the CSA, 21 U.S.C. 802, defines the phrase "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44). As the court of appeals correctly held (Pet. App. A6), petitioner's state conviction for cocaine possession is a "felony drug offense," as the phrase is defined in Section 802(44). See S.C. Code Ann. § 44-53-370(d)(1) (cocaine possession punishable by two years in prison, although categorized under state law as a misdemeanor).

Petitioner contends (Pet. 5) that "felony drug offense" as used in Section 841(b)(1)(A) takes its meaning from the provision that specifically defines that phrase, i.e., Section 802(44), but also from a separate provision, Section 802(13), which defines the term "felony" as "any Federal or State offense classified by

applicable Federal or State law as a felony," 21 U.S.C. 802(13). In support of that argument, he invokes (Pet. 6) the rule of lenity. In petitioner's view, the sentencing enhancement in Section 841(b)(1)(A) applies only when a defendant's prior conviction is punishable by more than one year in prison and is classified as a felony by applicable state or federal law. Pet. 5. Petitioner's prior conviction would not qualify as a felony drug offense under that interpretation because applicable state law classifies it as a misdemeanor.

The court of appeals correctly rejected petitioner's argument. The court determined that a crime need not be classified as a felony under state law to be a "felony drug offense" within the meaning of Section 841(b)(1)(A), because although "§ 841 does not define 'felony drug offense,'" "§ 802(44) does so in plain and unambiguous terms." Pet. App. A5. "[B]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." Ibid. (quoting Roberson, 459 F.3d at 52); see also Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."). In Section 841(b)(1)(A), "the phrase 'felony drug offense' is a term of art

invoked intentionally by Congress to incorporate by reference the specific definition contained in § 802(44)." Roberson, 459 F.3d at 52; cf. United States v. Cordoza-Estrada, 385 F.3d 56, 58 (1st Cir. 2004) (agreeing with other federal circuits that the statutory definition of the term "aggravated felony" in 8 U.S.C. 1101(a)(43) is a "term of art that includes within its ambit certain misdemeanors under state law that carry a sentence of at least one year").

The court of appeals' conclusion draws support from the statute as a whole. As the First Circuit noted, "the term 'felony' (without the accompanying words 'drug offense') is utilized extensively throughout the CSA for a variety of purposes," Roberson, 459 F.3d at 53, not all of which involve drug offenses. See, e.g., 21 U.S.C. 878(a)(3) (allowing "[a]ny officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General" to make warrantless arrests for "any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"); see also Roberson, 459 F.3d at 53-54 (collecting statutory provisions). Congress chose to use the more precise term "felony drug offense," in contrast, "solely to specify the type of prior conviction that will trigger a mandatory sentence enhancement." Id. at 53 (citing 21 U.S.C. 841(b)(1), 960(b)). As the First

Circuit explained, "Congress's decision to use the precise term 'felony drug offense' in § 841(b), instead of the more broadly used term 'felony,' evidences an intent to distinguish these sentence enhancement provisions from the other provisions that refer to the generic 'felony.'" Id. at 54. By using the specific phrase "felony drug offense," Congress "avoid[ed] the possibility that the substantial consequences of the mandatory sentence enhancements in § 841(b)(1)(A) would turn on the happenstance of a state's classification of a prior offense." Ibid.

As the First Circuit explained, if Congress had intended the definition in Section 802(44) to include by cross-reference the definition in Section 802(13), it could have so indicated in the text of the statute. Roberson, 459 F.3d at 53. "For example, Congress could have written § 802(44) to state that 'the term 'felony drug offense' means a felony . . . .,'" or it "could have written § 841(b)(1)(A) to trigger a 20-year mandatory minimum whenever any person commits a violation of § 841(a) 'after a prior conviction for a felony drug offense that is classified by applicable Federal or state law as a felony has become final.'" Id. at 52-53. Congress did neither. Because Section 841(b)(1)(A) clearly refers to the definition in Section 802(44), and neither section contains a cross-reference to Section 802(13), there is no "grievous ambiguity" in the statute and no reason to resort to the

rule of lenity. Muscarello v. United States, 524 U.S. 125, 138-139 (1998).

The history of the CSA further supports the court of appeals' interpretation of "felony drug offense." Before 1988, Section 841 did not include that phrase. Instead, each subsection of Section 841(b)(1) specifically described prior offenses that would trigger the sentencing enhancement and relied upon the classification of the offense under the law of the convicting jurisdiction. See, e.g., 21 U.S.C. 841(b)(1)(A) (1987) (enhanced penalties would apply "after one or more prior convictions * * * for a felony under any other * * * law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final"). In 1988, Congress amended the CSA to include the term "felony drug offense" in Section 841(b)(1)(A), and it defined the term in that section to require the convicting jurisdiction to classify the offense as a felony: "[T]he term 'felony drug offense' means an offense that is * * * a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressants or stimulant substances." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(1) and (2), 102 Stat. 4371. Finally, in 1994, Congress amended the statute to its current form, deleting the state-classification-based definition of "felony drug offense" in Section 841(b)(1)(A) and adding the

definition in Section 802(44), which focuses on the length of punishment associated with the prior conviction. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105, 108 Stat. 1987-1988.

Taken together, those changes support the conclusion that Congress intended to replace the prior definitions contained in Section 841(b)(1) with the definition in Section 802(44). See Roberson, 459 F.3d at 54 n.10. The court of appeals' decision correctly gives the specific, later-enacted statute controlling weight. See United States v. Estate of Romani, 523 U.S. 517, 532 (1998) (giving priority to the Tax Lien Act with respect to government claims of preference in insolvent taxpayer's estate as "the later statute [and] the more specific statute"); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). Further, Congress's decision to make the definition of "felony drug offense" independent of any given state's classification scheme makes sense "in the context of the evolving nature of the CSA," because as Congress "enact[ed] mandatory penalties," and then "increased the consequences of those mandatory penalties," it likely wished to "ensure that the mandatory recidivist penalty provisions would be applied uniformly not only across statutory lines, but across state lines." Roberson, 459

The court of appeals' holding that petitioner's prior offense was a "felony drug offense" is thus correct and does not warrant further review.

2. In United States v. West, 393 F.3d 1302 (2005), the D.C. Circuit came to the opposite conclusion, holding that the phrase "felony drug offense" incorporates the definitions contained in both Section 802(13) and Section 802(44). Id. at 1311-1315. The D.C. Circuit concluded that the presence of two definitions, for "felony" and "felony drug offense," rendered the statute ambiguous and triggered application of the rule of lenity. Id. at 1314-1315.

Unlike the First Circuit in Roberson, on which the court below relied, the D.C. Circuit did not consider the variety of ways in which the term "felony" is used throughout the entirety of the CSA; instead, it looked only to the sentence "enhancement provisions." West, 393 F.3d at 1314. See 21 U.S.C. 802 (providing that definitions therein apply to entire "subchapter" of the CSA, which is not limited to sentencing). The court failed to recognize that the term "felony" is used for a variety of purposes in the CSA, at times including more offenses and at times including fewer offenses than those described in Section 802(44). See, e.g., 21 U.S.C. 878(a)(3) ("felony" not limited to drug crimes); see also Roberson, 459 F.3d at 53-54 (collecting statutory provisions).

Review of petitioner's case is unwarranted, however, not only because the Fourth Circuit's decision is correct but also because

the conflict is extremely limited. This issue does not arise often, because the vast majority of States define offenses punishable by more than one year of imprisonment as felonies. See Gov't Br. at 26 n.20, Lopez v. Gonzales, 127 S. Ct. 625 (2006) (No. 05-547) (citing statutes). Further, in neither West, Roberson, nor petitioner's case did the parties seek rehearing en banc. Accordingly, the courts of appeals retain the ability to harmonize their decisions and eliminate the conflict. Finally, and in any event, the conflict is of very recent vintage, and this Court's review could benefit from additional consideration of the question by the lower courts. Review is thus unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

BEST AVAILABLE COPY

Supreme Court, U.S.
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No. 06-11429

IN THE SUPREME COURT OF THE UNITED STATES

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S RESPONSE TO THE BRIEF IN OPPOSITION BY THE UNITED STATES

Petitioner:

KEITH LAVON BURGESS, pro se
FCI Estill #93479-071

On the Brief:

MICHAEL R. RAY, Law Clerk
Legal Assistant-Paralegal

NOW BEFORE THE COURT COMES the Petitioner, pro se, KEITH LAVON BURGESS, to file his response in opposition to the brief of the Respondent UNITED STATES OF AMERICA.

The Petitioner is proceeding pro se with the assistance of an inmate Law Clerk. Petitioner would ask that the Court treat this response in accordance with Erickson v. Pardus, (2007) 167 L.Ed.2d 1081, as far as this Court "liberally construe[ing]" this reply to a "less stringent standard than [a] formal pleading[] drafted by [a] lawyer."

The Respondent spends the first four pages of their brief in opposition quoting the (undisputed) factual background of this case since its commencement (undisputed, of course, with the exception of the § 851 enhancement issue).

Respondent's argument fails miserably to convince the Court to not grant the writ of certiorari. If one were to be persuaded by the Respondent's position, then in essence, one would have to believe that the Petitioner was unfortunately sentenced within the District of South Carolina. Had Petitioner been sentenced in the District of Columbia, the § 851 enhancement would not have applied to increase the penalty to a minimum twenty years.

The Respondents contend that the Petitioner failed to request a re-hearing en banc of the Fourth Circuit's decision. One would then wonder, why, did the government not request re-hearing in the West case? Petitioner would have loved to had a re-hearing before the Fourth Circuit, but he was a might bit disadvantaged, due to the fact that not only did his ineffective trial counsel also rep-

the Supreme Court today, seeking to right this injustice, not only for the Petitioner, but for the fair and equal treatment for all of those criminal defendants who come after him. As to the Respondent's contentions regarding the failure of the Petitioner to ask for re-hearing, Petitioner was under the impression, until nearly the eleventh hour that his attorney would be filing this instant petition. It is apparent that counsel was in over his head, so to speak, as the record of this case clearly indicates there was (at least) one issue which had merit, and that same issue warranted a published opinion from the Fourth Circuit, and this instant advancement to the Honorable Court. Petitioner was expecting his attorney to represent him on this Petition, however, counsel withdrew from his representation.

The Respondent concedes that there is in fact a circuit split regarding the issue advanced in the instant Petition. The problem, they claim, is that it quite simply doesn't effect enough defendants to really matter. Try selling this argument to the poor souls like the Petitioner who are today sitting in federal custody with twenty-year mandatory minimums hanging over their heads. The Respondent further contends that the conflict itself is of a "very recent vintage" and further that this Courts review "could benefit from additional consideration of the question by the lower courts." Honestly now, how many more Defendants in the same predicament as this Petitioner must pass through the system, and be sentenced to an improper twenty year term — before enough are effected? The closing argument (on the brief) of the Respondent is, at best, literally laughable.

that had this Petitioner been fortunate enough to pass through the District of Columbia, versus the District of South Carolina, the twenty-year enhanced penalty would not have applied. The Respondent justifies this calamity by stating simply that not enough folks are effected for it to really matter, therefore the Petitioner is simply subject to the fallout, due to his being in (literally) the wrong district, at the wrong time. This argument must fail.

It is not necessary to obtain the input of any other lower courts' on the issue. The conflict is quite ripe for determination. Allowing the uncertainty to continue would constitute a manifest injustice, not only to this Petitioner, but to all those who come after him, to which the same circumstances apply. It is noteworthy that the instant case and West arose in a fairly short period of time. How many more and hanging in the valance? A criminal defendant has a right to know the punishment he faces. That same defendant has a right to be able to intelligently know not only the charges that are made against him, but too, the penalties which he may incur. With the current ambiguity, there is certainly no way for a defendant to intelligently make that determination. One could certainly argue that it would all depend as to what district (or circuit) he was in, and that, in itself should not be the determining factor.

The issue before this Court today is prime for review, and the pro se Petitioner respectfully requests that this tribunal grant the Petition for Writ of Certiorari, and that counsel be appointed to represent the Petitioner on any further proceedings before this Court. The statute is ambigious, and that ambiguity must be resolved utilizing the rule of lenity — in favor of this Petitioner.

WHEREFORE, the pro se Petitioner respectfully requests

whatever other and further relief that this Court may deem appropriate.

Respectfully submitted,

Dated: August 24, 2007

By: Keith L Burgess
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CERTIFICATE OF SERVICE

I, Keith L. Burgess do hereby certify that on this the 28th. day of August, 2007, I did deposit with the Institutional Special Mail, an exact copy of the within-named Response, properly addressed to:

Ms. Elizabeth A. Olson, Esq.
U.S. DEPARTMENT OF JUSTICE
Office of Solicitor General
Washington, DC 20530-0001

By: Keith L Burgess
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IN THE

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KEITH LAVON BURGESS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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QUESTION PRESENTED

Whether 21 U.S.C. § 841(b)(1)(A), which imposes the 20-year mandatory minimum sentence upon certain defendants previously convicted of a "felony drug offense," applies to a defendant previously convicted of a state offense classified as a misdemeanor under state law but punishable by more than one year's imprisonment.

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BRIEF FOR THE PETITIONER

Petitioner Keith Lavon Burgess respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1a-10a) is published at 478 F.3d 658.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2007. A timely petition for a writ of certiorari was filed on May 17, 2007. This Court granted the petition on December 7, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 841(a)(1) provides, in relevant part:

> [I]t shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . .

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841(b)(1)(A) provides, in relevant part:

> If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years . . . .

21 U.S.C. § 802(13) provides:

> The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

21 U.S.C. § 802(44) provides:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or State or of a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Prior versions of relevant provisions are collected in Appendix B to this brief.

STATEMENT

1. In 2002, petitioner Keith Burgess was arrested in South Carolina for possession of a small amount of cocaine in violation of S.C. Code Ann. § 44-53-370(d)(1). App. 3a; CA J.A. 79.[1] Like federal law, South Carolina classifies simple possession of cocaine with no prior drug offenses as a misdemeanor. *See* S.C. Code Ann. § 44-53-370(d)(1); *compare* 21 U.S.C. § 844; 18 U.S.C. § 3559. Although the offense was punishable by up to two years imprisonment, S.C. Code Ann. § 44-53-370(d)(1), the state court gave petitioner a one year suspended sentence, with two years of probation and fifty hours of community service. CA J.A. 79.

2. In 2003, Mr. Burgess pled guilty in federal court to a single count of conspiracy to dispute 50 grams or more of base cocaine in violation of 21 U.S.C § 841(a). The Government requested that the district court apply the sentencing enhancement set forth in 21 U.S.C. § 841(b)(1)(A)(viii). That provision states that "[i]f any person commits such a violation after a prior conviction for a felony drug offense has become final," the defendant shall be subject to a mandatory minimum sentence of 20 years imprisonment. *Id.*[2] The Government argued that petitioner's prior South Carolina conviction constituted a "prior felony drug

---

[1] "CA J.A." refers to the Joint Appendix filed in the court of appeals, the second volume of which, containing the presentence investigation report, was filed under seal. Both volumes are available in the record on appeal.

[2] The statute further provides that "if death or serious bodily injury results from the use of such substances," the defendant "shall be sentenced to life imprisonment." *Id.* Because no death or injury resulted from the offense conduct in this case, that provision does not apply here.

offense" within the meaning of the statute, even though the offense is considered a misdemeanor under state law, because the offense was punishable by more than a year's imprisonment. CA J.A. 31-32. Petitioner, on the other hand, argued that the state's classification of his prior offense as a misdemeanor precluded the court from treating it as a "felony drug offense" under the federal enhancement provision. CA J.A. 25-27.

The parties' disagreement centered on two provisions of the definitions section of the Controlled Substances Act, 21 U.S.C. § 802. Between 1988, when Congress extended the enhancement provision to apply to defendants with prior state felony drug convictions, and 1994, when the statute was amended to its present form, the definition of a qualifying prior drug "felony" offense was provided solely by Section 802(13), which defines the term "felony" to mean "any Federal or State offense classified by applicable Federal or State law as a felony."

In 1994 "Conforming Amendments" to the Act, Congress added a definition of "felony drug offense" while retaining the prior definition of "felony." Pub. L. 103-322 § 90105. The new definition of "felony drug offense" provided that the "term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs. . . ." *Id.*

Consistent with the interpretation given the modified Act by the D.C. Circuit in *United States v. West*, 393 F.3d 1302 (D.C. Cir. 2005), petitioner argued that the Act permitted an enhancement only for those prior offenses that qualify as a "felony" under Section 802(13) – *i.e.*, those considered felonies

under state law – and also qualify as a "felony drug offense" under Section 802(44) – *i.e.*, offenses that are punishable by more than a year's imprisonment under state law. CA J.A. 25-27, 34-35. The Government, on the other hand, argued that the 1994 conforming amendments effectively displaced Section 802(13)'s role in defining the scope of the 20-year enhancement provision, leaving the scope of Section 841(b)(1)(A) defined solely by reference to Section 802(44). *See* CA J.A. 31. Under that view, it was enough that petitioner's prior state offense was punishable by more than a year, even though both state and federal law treat such offenses as misdemeanors, and even though petitioner was actually given a one-year suspended sentence.

The district court accepted the Government's view of the statute and applied the mandatory minimum 20-year sentence. CA J.A. 39-40. The court granted petitioner a downward departure for substantial assistance and sentenced him to 156 month's imprisonment. CA J.A. at 54-55.

3. Petitioner appealed and the Fourth Circuit affirmed. The court acknowledged that Section 841(b)(1)(A) does not itself define what constitutes a "felony" offense for purposes of triggering its 20 year mandatory minimum, App. 7a, and did not dispute that the definition section of the statute provides two definitions that, on their face, are applicable. Nor did the court dispute petitioner's contention that it is possible to read Section 802(44) as incorporating the felony classification requirement in Section 802(13). But the court of appeals nonetheless decided that "[b]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by

reference to the definition in § 802(44)" alone. App. 8a (quoting *United States v. Roberson*, 459 F.3d 39, 52 (1st Cir. 2006)). The Fourth Circuit did not contest that its reading adopted a more expansive view of a criminal statute, an interpretation that would conflict with the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)), if that rule were applicable. But the court concluded that the rule of lenity had no application here because it found "no grievous ambiguity or uncertainty in the pertinent statutes." App. 8a (citation and internal quotation marks omitted).

Petitioner filed a pro se petition for certiorari, which this Court granted on December 7, 2007. 128 S.Ct. 740.

SUMMARY OF THE ARGUMENT

The circuits have divided over whether state misdemeanor drug convictions constitute "prior conviction[s] for a felony drug offense" under Section 841(b)(1) of the Controlled Substances Act. While it was clear for most of the Act's history that no state conviction classified by the state as a misdemeanor could be a "felony drug offense," the meaning of the term "felony drug offense" was rendered ambiguous in 1994 by what Congress labeled technical "Conforming Amendments." These amendments created a new definition for the term "felony drug offense," while leaving untouched the Act's pre-existing definition for "felony." The new definition of "felony drug offense" defines the term without specifying whether it covers "offense[s]" beyond those classified under state law as felonies.

The court of appeals below deemed the two definitions in conflict and concluded that the newer definition, more precisely tailored to Section 841(b)(1)(A), should displace the definition of "felony" that had long governed the enhancement provision's scope. That is perhaps a plausible construction of the statute. But it is a view that is substantially undermined by the drafting history of the Act, long-standing doctrine disfavoring repeals by implication, and the underlying purposes of the statute. Instead, these considerations support the view that Congress intended the newer definition to incorporate the older, allowing both definitions to be read together and avoiding the implication that Congress has dramatically expanded the coverage of a severe mandatory minimum sentencing provision through "conforming amendments" and without a word of explanation in the legislative history.

A criminal statute subject to two plausible constructions, one harsher than the other, must be resolved in favor of lenity. Congress has legislated against the backdrop of the rule of lenity for generations, aware that when it intends to make previously innocent conduct criminal, or increase the penalty for previously illegal conduct, it must make that intention plain. Strict application of the rule of lenity is especially appropriate in the context of mandatory minimum sentencing, which alters the traditional allocation of sentencing authority among the branches and where a mistaken interpretation can result in particularly severe consequences that may be, as a practical matter, difficult for Congress to correct. On the other hand, there is every reason to believe that Congress stands at the ready to revise an unduly lenient construction, as the history of this sentencing provision illustrates.

ARGUMENT

In punishing more severely those defendants previously convicted of a "felony drug offense" under state law, Section 841(b)(1)(A) gives rise to a common ambiguity. While the term "felony" is widely used in the law, its precise definition varies from jurisdiction to jurisdiction. Congress resolved the ambiguity when it drafted the Controlled Substances Act by deferring to the sentencing state's treatment of an offense. But a technical amendment in 1994 created new ambiguity by subjecting the term "felony drug offense" to two facially applicable statutory definitions, neither of which expressly incorporates or trumps the other. As a result, reasonable jurists on different courts have reached conflicting constructions of the Act. The better view – supported by the text, structure, history and purposes of the Act, and required by the rule of lenity – is that Congress incorporated the pre-existing definition of "felony" into the new, more specific definition of "felony drug offense," sensibly limiting the severe 20-year mandatory minimum sentence to those who have committed prior state offense sufficiently serious *both* to be considered felonies in the convicting state *and* to warrant punishment of more than a year's imprisonment.

I. Under The Best Reading Of The Statute, Section 841(b)(1)(A) Applies To Prior State Convictions Classified As Felonies By The State And Subject To More Than One Year's Imprisonment.

Confronted with the question presented here, the D.C. Circuit held that the two definitions in Section 802 should be read together. This construction of the Act – rejected by the Fourth Circuit in this case – is

consistent with the purposes of the statute, its historical evolution, and the legal background against which Congress acted when it passed the 1994 conforming amendments giving rise to the statutory ambiguity at issue in this case.

A. The Statutory Text And History Support The View That Congress Intended Section 802(44) To Be Read In Conjunction With Section 802(13).

1. The Controlled Substances Act in general, and Section 841(b)(1)(A) in particular, are the result of an accretion of legislative amendments over the past three and a half decades.

Original Form. As originally enacted in 1970, Section 841(b)(1)(A) of the Controlled Substances Act imposed a maximum 30-year sentence upon individuals with prior *federal* felony drug convictions. 21 U.S.C. § 841(b)(1)(A) (1970).[3] In a separate definition section applicable to the Act as a whole, the statute defined the word "felony" to mean, "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13) (1970).

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[3] The provision stated: "If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both." 21 U.S.C. 841(b)(1)(A) (1970).

1984 Amendment. In 1984, Congress extended the enhancement provision to those convicted of a prior *state* felony drug offense, and increased the maximum enhanced sentence to 40 years. *See* Pub. L. 98-473 § 502(1)(A). Thus, as amended, the enhancement applied to "any person [who] commits such a violation after one or more prior convictions of him . . . for a felony under any . . . other law of a State, the United States, or a foreign country relating to narcotic drugs. . . ." 21 U.S.C. § 841(b)(1)(A) (1984). The enhancement provision did not itself define what constituted a "felony under any . . . law of a State . . . relating to narcotic drugs. . . ." *Id.* Instead, the statute retained the prior definition of "felony" in Section 802. *See* 21 U.S.C. § 802 (13) (1984). There was no further definition of the term "felony" or "felony drug offense" in the statute. Accordingly, the newly-extended enhancement provision did not apply in cases, such as this, in which state law classified the prior state conviction as a misdemeanor.

1986 Amendment. In 1986, Congress amended Section 841(b)(1)(A) to impose a mandatory *minimum* 20 year sentence in place of the previous *maximum* 40 year sentence. *See* Pub. L. 99-570, title I, § 1002.[4] The amendments, however, made no changes relating to the type of prior state convictions that would trigger the enhancement.

1988 Amendment. In 1988, Congress amended Section 841(b)(1)(A) again, revising the language of the provision, but not its scope. *See* Pub. L. 100-690, title VI, § 6452. The amended statute required a 20-year mandatory minimum sentence for "any person

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[4] The amendments also made Section 841(b)(1)(A) applicable to additional federal crimes. *See id.*

[who] commits such a violation after a prior conviction for a *felony drug offense* has become final." 21 U.S.C. § 841(b)(1)(A) (1988) (emphasis added). Although the revision introduced a new phrase – "felony drug offense" – Congress defined that phrase to capture precisely the same offenses as had been covered under the prior version of the Act. Thus, the statute provided that "[f]or purposes of this subparagraph, the term 'felony drug offense' means an offense that is . . . a *felony* under any law of a State . . . that prohibits or restricts conduct relating to narcotic drugs . . . ." *Id.* (emphasis added). And the word "felony," in turn, continued to be defined by Section 802(13), which continued to exclude state drug convictions for offenses considered to be misdemeanors under state law.

Accordingly, even after the 1988 amendments, courts continued to decline to apply the enhancement provision when a defendant had previously been convicted of a state drug offense considered a misdemeanor by state law. *See, e.g., United States v. Brown,* 33 F.3d 1014, 1017–18 (8th Cir. 1994);[5] *United States v. Donahue,* No. CIV.A. 92 123-1, 1993 WL 114031, at *3 (E.D.Pa. April 13, 1993); *see also United States v. Brown,* 937 F.2d 68, 70 (2d Cir. 1991) (reaching same conclusion under Section 841(b)(1)(B), which has language identical to Section 841(b)(1)(A)).

1994 Amendments. In 1994, Congress passed a comprehensive crime bill, the Violent Crime Control Act. *See* Pub. L. 103-322. In some provisions of the Act, Congress expressly and unambiguously amended

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[5] This case was decided before the 1994 conforming amendments were passed.

the Controlled Substances Act to increase existing, or to create new, sentencing enhancements. For example, in Section 90102, entitled "Increased Penalties for Drug-Dealing in 'Drug-Free' Zones," the Act required the United States Sentencing Commission to create a new "enhancement for a defendant convicted of violating section 419 of the Controlled Substances Act (21 U.S.C. 860)." *See also* Section 90101 (entitled "Enhancement of Penalties for Drug Trafficking in Prisons," amending 18 U.S.C. § 1791 to expand the drug offenses punishable under that section); Section 90103 (entitled "Enhanced Penalties for Illegal Drug Use in Federal Prisons and for Smuggling Drugs into Federal Prisons," requiring the United States Sentencing Commission to enhance the penalties for the simple possession of a controlled substance within, or the smuggling of a controlled substance into, a Federal detention facility).

None of those provisions modified the enhancement at issue here. Instead, Section 841(b)(1)(A) took its current form as the result of a what Congress labeled "Conforming Amendments."[6] The conforming amendments moved the definition of "felony drug offense" out of the body of Section 841(b)(1)(A), and into a new subsection of the general definitions section. Pub. L. 103-322 § 90105(c)-(d). Congress also changed the wording of the definition. The revised definition, which remains applicable today, provided that the term "felony drug offense" means "an offense that is punishable by imprisonment for more than one year under any law

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[6] Pub. L. 103-322 § 90105 (entitled "Conforming Amendments to Recidivist Penalty Provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act").

of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." *Id.* § 90105(d).

Importantly, the 1994 conforming amendment did not alter Section 802(13) or otherwise modify the scope of its application. The amendment did not, for example, provide that Section 802(13) would no longer have application to the meaning of the word "felony" as used in Section 841(b)(1)(A) or as used in the phrase "felony drug offense" in Section 802(44). Nor did the amendment modify Section 841(b)(1)(A) to provide that the term "felony" as used in that provision would be defined solely by Section 802(44) without reference to Section 802(13).

2. In light of this drafting history and the resulting statutory text and structure, the D.C. Circuit reasonably construed the statute to permit an enhanced mandatory minimum sentence only in the case of prior state drug convictions that meets both the definition of a "felony" as defined in Section 802(13) and the definition of a "felony drug offense" as defined in Section 802(44). That construction of the Act is sensible for several reasons:

First, under the plain text of the definition section, Congress provided that each definition shall be applicable whenever the defined term is "used in this subchapter." *See* 21 U.S.C. § 802. There is no question that the word "felony" is used in both Section 841(b)(1)(A) and 802(44). In fact, at least until the 1994 conforming amendment, it was undisputed that Section 802(13) applied to define the use of the word "felony" in Section 841(b)(1)(A), and thereby the scope of the enhancement provision. When the 1988 amendment introduced the phrase

"felony drug offense" for the first time, it also defined the term "felony drug offense" by incorporating Section 802(13)'s definition of "felony." *See* Pub. L. 100-690 § 6452(a).

To be sure, when Congress moved the definition of "felony drug offense" from the body of Section 841(b)(1)(A) to the definitions section in 1994, it did not expressly repeat the term "felony" as part of the definition. But Congress was aware that the word "felony" – used as part of the defined phrase "felony drug offense" – was separately defined in the very same definition section of the statute; that the definition of "felony drug offense" under the 1988 version of the statute had previously incorporated the definition of "felony" under Section 802(13) by reference; and that the definition of "felony" in Section 802(13) had long limited the scope of the enhancement provision even prior to 1988. Congress's failure to repeat the word "felony" before the word "offense" as part of the definition of "felony drug offense" in Section 802(44) is insufficient reason to believe that Congress intended the 1994 conforming amendments to effect a sea change in the scope of the enhancement provision, sweeping up for the first time in the history of the statute offenses theoretically subject to more than a year's imprisonment but nonetheless considered too insignificant by the convicting State to warrant treatment as a felony under state law.

Instead, the better reading is that in referring to "*an offense* that is punishable by imprisonment for more than one year," 21 U.S.C. § 802(44) (emphasis added) – in a provision defining a "*felony* drug offense," and in a definition section with a prior definition of "felony" – the definition presupposed an

offense classified as a felony within the meaning of the prior definition.

Second, neither the Government nor the court of appeals questioned that the two definitional provisions can be read together. As construed by the D.C. Circuit, Section 802(13) continues to perform its long-established function of ensuring that the enhancement applies only to state offenses considered sufficiently serious by the convicting state to warrant felony classification under state law and, more importantly, the serious collateral consequences that flow from that classification. *See infra* 17-22. Section 802(44), in turn, ensures that reliance on a state's use of the label "felony" alone does not erroneously capture truly minor offenses, reserving the enhancement for crimes subject to more than a year's imprisonment regardless of the state label. *See infra* 22-23. As discussed below, such a reading is not only possible, but entirely sensible in light of the statutory history and congressional purposes. *See infra* 17-24.

Third, a contrary reading would effectively impute upon Congress the intent to effect an implied partial repeal of Section 802(13), withdrawing its application from one of the principal provisions to which it had long applied through multiple prior revisions of the statute. But this Court has long held – and Congress in drafting statutes like the 1994 amendments in this case has long understood – that courts are reluctant to find that a new enactment has impliedly repealed a prior statutory provision, even in part. *See, e.g., Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Morton v. Mancari*, 417 U.S. 535, 549-551 (1974); *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Accordingly, when Congress truly intends to

render a prior statutory provision partially ineffective, it can be expected to do so clearly and directly. At the same time, and for that reason, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551. As noted above, there is no question that both definitional provisions can be read together and rendered effective. And there is no clear indication that Congress intended any other treatment.

Fourth, reading the two definitional provisions together is especially appropriate here, given that Congress for many years, and through many revisions of the Act, indisputably intended Section 802(13) to play an important role in identifying state convictions sufficiently serious to trigger the Section 841(b)(1)(A) enhancement. This Court should not lightly impute a congressional intent to alter course dramatically without a clearer indication that such an alteration was intended.

Fifth, this hesitation is particularly warranted in this case, where the alleged revision to Section 802(13)'s scope was accomplished through a provision expressly labeled as "Conforming Amendments." Pub. L. 103-322 § 90105. That is a title Congress does not ordinarily use for a measure intended to effect a significant substantive expansion of a criminal sentencing provision. *See, e.g., Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 324 (2001) (refusing to read conforming amendment as having substantive effect); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). The choice of title is particularly instructive in this case as the

immediately preceding provisions, which unambiguously enacted sentencing enhancements, were expressly labeled as such. *See* Pub. L. 103-322 §§ 90101-03.[7]

B. Reading Both Definitions Together Is Also Consistent With The Statute's Purposes.

Applying both Section 802(13) and Section 802(44) is consistent with the underlying purposes of the statute.

1. Given the severity of Section 841(b)(1)(A)'s enhancement, it is not surprising that Congress would have expected that it would apply only to those previously convicted of a state drug offense serious enough to be classified as a felony. For the first ten years the enhancement applied to state felonies, Congress deferred entirely to the states' characterization of the prior conviction, relying on the states to distinguish serious from less serious crimes through the traditional distinction between misdemeanor and felony offenses. 21 U.S.C. § 802(13) (1984).

Deferring to the states' classification was, in general, an effective proxy for gauging the seriousness of a prior state offense.[8] Traditionally, the divide

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[7] Nothing in the legislative history of the 1994 Amendment suggests a contrary conclusion. Although the legislative history for the Violent Crime Control Act as a whole is extensive, it does not contain any useful clues concerning the purpose of the conforming amendments at issue here. *See, e.g.*, H. Rep. 103-694 (1994); H. Rep. 103-711 (1994).

[8] Congress made a similar calculation when it enacted the Armed Career Criminal Act of 1984, codified in 18 U.S.C. §§ 921, 924(e). That statute provides enhanced punishment for individuals with a prior "violent felony" conviction. *See id.*

between felonies and misdemeanors has reflected a state's considered view of which offenses were relatively minor and which passed over a threshold requiring the application of the law's severest punishments. *See, e.g.*, Rollin M. Perkins & Ronald M. Boyce, CRIMINAL LAW 15 (3d ed. 1982) ("The difference in treatment between felonies and misdemeanors has carried over from common law to current practice, and today's misdemeanors are often treated differently . . . [in] the consequences of a conviction."). Accordingly, states have widely attached serious collateral consequences to felony convictions that are not applied to those convicted solely of misdemeanor offenses. *See Blackledge v. Perry*, 417 U.S. 21, 28 n.6 (1974) ("Even putting to one side the potentiality of increased incarceration, conviction of a 'felony' often entails more serious collateral consequences."); *see also Richardson v. Ramirez*, 418 U.S. 24, 48-54 (1974) (discussing historical use, and judicial approval, of felon disfranchisement).

To be sure, there are other possible proxies as well, including the maximum potential term of imprisonment. But Congress could well conclude that

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§ 924(e)(1). The statute generally defines "violent felony" to include certain crimes "punishable by imprisonment for a term exceeding one year." *Id.* § 924(e)(2)(B). But in the definition section, Congress excluded from the definition of "crimes punishable by imprisonment for a term exceeding one year," any State offense "classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20)(B). While Congress did not draw precisely the same line here, the ACCA example demonstrates that Congress will sometimes limit the scope of a definition of the word "felony" through a separate provision that defers to a State classification decision.

reliance on that proxy alone could be misleading, falsely identifying some prior convictions as significantly more serious than is warranted by the facts of the case. This problem may be particularly acute in the case of state drug convictions. A number of states permit punishment of over a year for relatively minor offenses that they classify as misdemeanors and that other states and the federal government would likewise consider misdemeanors and subject to less than a year's imprisonment. Simple possession cases, like petitioner's prior state conviction, are the most common. Many states and the federal government[9] treat simple cocaine possession – and most states and the federal government treat simple marijuana possession – by an individual with no prior drug record as a misdemeanor punishable by less than a year's imprisonment.[10] However, a number of states, while classifying such crimes as misdemeanors, allow a term of imprisonment of more than one year.[11] And

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[9] The CSA, which proscribes drug-related felony and misdemeanor offenses under federal law, generally punishes trafficking crimes as felonies and simple possession offenses as misdemeanors. *See* 21 U.S.C. §§ 841–844. For example, if the predicate offense at issue in this case had been prosecuted under federal law, the CSA would have classified it as a misdemeanor and the defendant clearly would not have received an enhanced sentence for his second offense. 21 U.S.C. § 844(a); 18 U.S.C. § 3559(a) (a conviction under the CSA for a first offense of simple possession of cocaine is classified as a Class A misdemeanor and punishable by no more than one year in prison).

[10] For a survey of state drug laws, see NATIONAL SURVEY OF STATE LAWS 170-210 (Richard A. Leiter ed., Thomson Gale 2005).

[11] *See, e.g.*, COLO. REV. STAT. § 18-18-406(4)(a) (2007) (classifying possession of between one and eight ounces of

California subjects such crimes to more than a year's imprisonment, but leaves to the sentencing judge's discretion both the length of any actual sentence and the classification of the conviction as a felony or a misdemeanor. *See, e.g.*, CAL. PENAL CODE § 17(b) (2007); CAL. HEALTH & SAFETY CODE § 11357(a) (2007).

In light of such variability, Congress could well conclude that reliance on the potential term of imprisonment for a state offense could lead to the imposition of harsh mandatory minimum sentences on individuals who were not the serious repeat offenders Section 841(b)(1)(A) was meant to target. And Congress could well have been concerned that it would be exceedingly unfair to apply the Act's severe

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marijuana as a "Class 1 misdemeanor," punishable under COLO. REV. STAT. § 18-1.3-501 (2007) by up to 18 months); MD. CRIM. LAW § 5-601 (2007) (punishing possession of controlled substances as a misdemeanor and providing punishment of imprisonment by up to four years); 35 PA. STAT. ANN. § 780-113(b) (2005) (classifying drug offenses including possession as misdemeanors and authorizing punishment of up to three years' incarceration); MASS. GEN. LAWS ANN. ch. 94C, § 34 (2007) (second and subsequent offenses for possession of cocaine and first offenses for possession of heroin punishable by up to two years in county house of correction, although still classified as misdemeanors under MASS. GEN. LAWS ANN. ch. 274, § 1 (2007)); S.C. CODE ANN. § 44-53-370(d)(1)(2006) (a person who knowingly possesses certain classified drugs, including cocaine "is guilty of a misdemeanor" and subject to up to two years' imprisonment); VT. STAT. ANN. tit. 18, § 4230 (2007); VT. STAT. ANN. tit. 13, § 1 (2007) (second marijuana offense punishable by up to two years which state defines as misdemeanor).

In addition, several other states authorize enhancements for subsequent offense misdemeanors, making them punishable by greater than one year. *See, e.g.*, WASH. REV. CODE ANN. § 69.50.408(1) (2007); W.VA. CODE ANN. § 60A-4-408 (2007).

mandatory minimum to individuals who would not be subject to that extreme punishment had they been convicted of precisely the same offense in another state or in federal court.

Relying on states' classification of an offense also reflects deference to the judgment of Congress's co-equal sovereigns in an area in which states have traditionally exercised primary jurisdiction and have developed special expertise. *Cf. United States v. Emmons*, 410 U.S. 396, 411-12 (1973) ("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.") (quoting *Bass*, 404 U.S. at 349). Congress would have been aware that in our federal systems, states "serve as a laboratory" in "novel economic and social experiments without risk to the rest of the country." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). This has been especially true in the area of drug enforcement policy, where states have experimented with differing responses to the use of illegal drugs. *See generally* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783 (2004). It is quite possible, for example, that a state could decide to make a minor misdemeanor possession offense subject to more than a year's imprisonment not because the state viewed the offense as more serious than does its neighbors or the federal government, but rather to allow sentencing judges the discretion to decide that an offender would benefit from longer access to prison drug treatment services or at least from a longer period of isolation from access to addictive substances. A state might,

however, be deterred from such a course by the prospect that every person subsequently convicted of that crime – even if that person, like petitioner, were given no actual jail time at all – would be at risk of severe federal punishment on a subsequent federal conviction.

At the same time, Congress could have believed that the addition of Section 802(44) served a similarly important, and supplementary purpose, removing from the purview of Section 841(b)(1)(A) low-level drug offenses punishable by less than one year but nonetheless classified as felonies in some states. For example, Arizona, like the majority of states and the federal government, prescribes probation or at most one year in prison for simple marijuana possession offenses, indicating that it considers possession for personal use as a less serious crime than other drug offenses. *See* ARIZ. REV. STAT. ANN. § 13-901.01 (2007). Nonetheless, Arizona classifies these possession offenses as felonies. *See* ARIZ. REV. STAT. ANN. §§ 13-701, 13-3405 (2007) (defining possession of marijuana of less than two pounds and possession of drug paraphernalia as class six felonies punishable by up to one year in prison).[12] Thus, the addition of Section 802(44) ensures that individuals with prior Arizona state convictions for the simple possession of small amounts of marijuana do not receive a mandatory 20-

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[12] The same is true in Ohio and North Carolina. *See Liao v. Rabbett*, 398 F.3d 389, 390 (6th Cir. 2005) ("Possession of heroin . . . is a "fifth degree felony" under Ohio law, but is punishable by a *maximum* term of 12 months' imprisonment.") (referring to OHIO REV. CODE § 2929.14(A)(5)); N.C. GEN. STAT. §§ 90-95(d) (classifying simple possession as a Class I felony); N.C. GEN. STAT. § 15A-1340.17 (2007) (Class I felonies not punishable by more than one year)

year mandatory minimum sentence under Section 841(b)(1)(A).

2. The court of appeals' construction of the statute, on the other hand, requires this Court to conclude that Congress intended to use the 1994 conforming amendments to radically alter the statute's operation and scope, sweeping under the enhancement provision, for the first time, thousands of minor misdemeanor violations as the basis for extraordinary criminal punishment. As noted above, numerous states make minor drug possession misdemeanors punishable by more than a year's imprisonment for first time offenders.[13] While it is not inconceivable that Congress could make that policy judgment, it is implausible that it would have enacted such an abrupt policy shift so obliquely, through "Conforming Amendments" and without a word of explanation in the text of the statute or the legislative history.

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[13] Moreover, the number of state misdemeanor offenses that would be considered felonies under Section 802(44) alone would increase substantially under the view – advanced by the United States in the context of the Armed Career Criminal Act, 18 U.S.C. § 924(e), in *United States v. Rodriquez*, No. 06-1646 (argued Jan. 15. 2008) – that a crime is "punishable by" more than a year's imprisonment if the maximum sentence under the provision exceeds a year for recidivist offenders. *See* Reply Brief for the United States at 1. Most state misdemeanor drug offenses are punishable by less than a year for a first-time offender, but more than a year for recidivists. *See* NATIONAL SURVEY OF STATE LAWS, *supra* at 170-210.

C. The Court of Appeals' Conclusion That The Statute Unambiguously Defines "Felony Drug Offense" By Reference To Section 802(44) Alone Is Incorrect.

The court of appeals did not deem it necessary to consider the statutory history or legislative purposes of the Act because it concluded that the plain language of the statute conclusively resolved the question. Relying on "commonsense," the court concluded that Congress must have intended Section 802(44) alone to define the scope of Section 841(b)(1)(A) because subsection (44) used the same phrase – "felony drug offense" – as is used in the substantive enhancement provision. App. 8a (quoting *Roberson*, 459 F.3d at 52). The comparison between language in Sections 841(b)(1)(A) and 802(44) is understandable. "Statutory definitions control the meaning of statutory words, of course, in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). But as shown above, it is possible to read the language of the statutory definition in a way that gives effect to all the applicable definitions and is consistent with the drafting history of the Act and the purposes of the statute. When construing a statute, a court does not focus exclusively on "a single sentence or member of a sentence, but looks to the provisions of the whole law." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (quotation marks omitted). And when construing a single word, a court must "consider not just the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Thus, when reading a statutory definition "in a mechanical fashion" would "create obvious incongruities" or "destroy one of the

major purposes" of another provision this Court has "concluded that Congress would not have intended such a result." *Lawson*, 336 U.S. at 201.

Invoking another canon, the Government has argued that the decision below "correctly gives the specific, later enacted statute controlling weight." BIO 12. Again, in many circumstances, the canon that the specific governs the general provides a useful rule of construction. But "[c]anons of construction need not be conclusive and are often countered . . . by some maxim pointing in a different direction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Thus, canons of construction "are simply rules of thumb which will sometimes help courts determine the meaning of legislation." *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (internal citations omitted). The general presumption that Congress intends a more specific provision to govern a more general provision is less instructive when the more specific provision is added through an amendment that does not expressly repeal or limit the former, broader provision. In that context, the presumption against implied repeals provides the better interpretive guide. Thus, for example, in *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curium), this Court was asked to decide whether a district court had discretion to give a suspended sentence to a defendant who committed a felony while on release pending trial. A prior general statute provided judges with broad authority to suspend sentences, 18 U.S.C. § 3651, but a more recent and more specific statute provided that in the context of crimes committed while on release pending trial, "shall be sentenced . . . to a term of imprisonment of not less than two years." 18 U.S.C. § 3147. The Government argued that the more recent and specific provision superseded the

older, more general provision. 480 U.S. at 524. This Court rejected that argument. Rather than applying the presumption that the specific governs the general, or that the more recent enactment controls the older provision, this Court applied instead the "well[-]settled" rule that "repeals by implication are not favored and will not be found unless an intent to repeal is 'clear and manifest.'" *Id.* at 524 (citations omitted).

So, too, in this case, the Court should endeavor to read Sections 802(13) and 802(44) together, a result that is consistent not only with the Court's general interpretive practice, but also with the history, text, and purposes of the statute.

II. The Rule Of Lenity Should Apply To Resolve Any Ambiguity In The Scope Of Section 841(b)(1)(A).

Even if a contrary reading of the Act were plausible, and even if it were in some ways more persuasive, this Court has long refused to adopt the stricter of two plausible interpretations of an ambiguous criminal statute. To the extent the statute in this case is ambiguous, the choice between competing interpretations should be resolved by application of this traditional "canon of strict construction of criminal statutes." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Applying this "rule of lenity" is particularly appropriate in the context of mandatory minimum sentencing provisions, which can have particularly serious consequences for criminal defendants, while also altering the traditional allocation of sentencing authority between the judicial, executive, and legislative branches.

A. The Courts Have Long Applied The Rule Of Lenity To Maintain Separation Of Powers And To Safeguard The Rights Of Defendants.

Chief Justice John Marshall described the rule of lenity as "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). This "venerable rule," *United States v. R. L. C.*, 503 U.S. 291, 305 (1992), requires that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoke in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted). Although that particular formulation describes the rule of lenity in terms of defining crimes, the Court has consistently held that "this principle of construction applies to sentencing as well as substantive provisions." *United States v. Batchelder*, 442 U.S. 114, 121 (1979).[14]

The rule of lenity has its origins as a principle of strict construction developed by early English courts to moderate the harshness of contemporary

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[14] *See also R. L. C.*, 503 U.S. at 305; *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Ladner v. United States*, 358 U.S. 169, 178 (1958); *Prince v. United States*, 352 U.S. 322, 328 (1957); *Bell v. United States*, 349 U.S. 81, 83 (1955). Similarly, in determining whether conduct constitutes a single offense or multiple crimes the Court has applied the rule of lenity because the resolution impacts the severity of the punishment, even if the criminality of the defendant's conduct is not in question. *See Whalen v. United States*, 445 U.S. 684, 695 n. 10 (1980); *Simpson v. United States*, 435 U.S. 6, 15 (1978); *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

punishments. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749-50 (1935). At the time, the default punishment in the king's court for virtually all felonies was death. J.M. Beattie, CRIME AND THE COURTS IN ENGLAND, *1660-1800* 141 (1986). In contrast, those who associated with the Church could claim the "benefit of clergy," which entitled them to be tried before an ecclesiastical court, where the punishments were less harsh. *Id.* at 141-42. [15]

Over time, the court expanded access to the benefit of clergy.[16] In response, Parliament began to enact statutes that repealed the benefit, until even relatively minor property crimes were punishable only by death. *Id.* at 143–45. Concerned by the explosion of minor crimes subject to mandatory capital punishment, courts developed the practice of maintaining the benefit of the clergy unless Parliament had repealed it in extremely explicit terms. Hall, *supra*, at 750–51. For example, when Parliament repealed the benefit of the clergy for those who stole "horses," courts interpreted the statute as not applying to those who stole a single horse. William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND * 88.

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[15] In practice, defendants who were supposed to be tried before ecclesiastical courts rarely were. Instead, by the late 1500s, they received a smaller punishment from the king's court, usually branding or a short jail sentence. Beattie, *supra*, at 142.

[16] The courts granted the benefit of the clergy to those who could pass a literacy test, originally on the ground that only clergy were taught to read. *Id.* at 141. In the Renaissance, as literacy became more widespread, more and more defendants were able to claim the benefit of the clergy. *Id.*

The rule of lenity was carried over to the colonies and incorporated into the American legal tradition. Chief Justice Marshall grounded the rule in American constitutional norms in *Wiltberger*, 18 U.S. 76. There, the Court declined to apply a broad construction to a federal criminal statute, even while recognizing that it was "extremely improbable" that Congress would have intended the narrow construction the Court adopted. *Id.* at 105. The Chief Justice nonetheless explained that strict application of the rule of lenity serves a broader purpose in ensuring that courts do not wrongly impute upon Congress an intent to wield its criminal legislative authority more broadly than that body intended. He observed that this rule of strict construction was "founded on the tenderness of the law for the rights of individuals" and the recognition that it "is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Id.* at 95.

These two justifications for the rule of lenity – protecting individual liberty and maintaining separation of powers – has continued to shape this Court's application of the rule of lenity. Thus, in *McBoyle v. United States*, 283 U.S. 25 (1931), the Court held that a statute criminalizing the transport of any stolen "self-propelled vehicle not designed for running on rails" did not apply to a stolen airplane. *Id.* at 26. Justice Holmes, writing on behalf of the Court, explained that although an airplane fell within the text of the statutory definition, a narrower interpretation – one limiting the word "vehicle" to "a thing moving on land" – was also possible. *Id.* Holmes observed that "[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language

that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Id.* at 27.

The Court has recognized that these principles are no less important when setting punishments than when defining crimes. In *R. L. C.*, 503 U.S. at 294, the Court examined a statute that allowed a judge to impose "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" and considered whether this "maximum term" referred to the statutory maximum or the maximum sentence under the federal sentencing guidelines. *Id.* at 294, 297. Four members of the Court believed that the statute unambiguously referred to the lower maximum under the guidelines, but stated that if the statute had been ambiguous, they would have resolved the question by resort to the rule of lenity. *Id.* at 305. Three other members believed that the statute was ambiguous and resolved the ambiguity by employing the rule of lenity. *Id.* at 307–08. As Justice Scalia explained, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not to be imposed." *Id.* at 309 (Scalia, J., concurring).

B. The Rule Of Lenity Is Especially Appropriate In The Context Of Mandatory Minimum Sentencing Provisions.

For three reasons, the traditional justifications for the rule of lenity apply with special force when construing statutes imposing mandatory minimum sentences.

First, even more so than a statutory maximum sentence, like that at issue in *R. L. C.*, a mandatory minimum sentence has a profound impact on individual liberty, often a greater impact than the distinction between conduct that is legal and that which is criminal but subject to only minor sanction. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978) (applying the rule of lenity to construe scope of crime with maximum punishment of one year in jail upon first offense). The rule of lenity is "rooted in 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *R. L. C.*, 503 U.S. at 305 (quoting *Bass*, 404 U.S. at 347–48).[17] Federal mandatory minimum sentences, including the one at issue in this case, can leave defendants "languishing in prison" far longer than Congress intended if erroneously extended further than the legislature intended.[18] Accordingly, it is especially appropriate to require a clear statement from Congress before extending a mandatory minimum sentencing provision farther

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[17] *See also Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988) (O'Connor, J., concurring) (declining to assume that state law subjected 15-year-old to the death penalty because "there [was] a considerable risk that the Oklahoma Legislature either did not realize that its actions [in passing a new law] would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility").

[18] In this case, for example, the application of Section 841(b)(1) doubled petitioner's minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A)(viii). In light of that ten-year difference, the decision in this case will determine whether Mr. Burgess will have an opportunity to play any role at all in the upbringing of his daughter, who was six-months old at the time of sentencing. CA J.A. 81.

than its language necessarily requires. *See Castillo v. United States*, 530 U.S. 120, 131 (2000) (recognizing that the length of the defendant's potential sentences weighed in favor of reading a statute in light of the rule of lenity).

Second, it is appropriate to require a plain statement from Congress before extending the reach of a mandatory minimum provision because such statutes necessarily alter the traditional balance between legislative, executive and judicial responsibilities in criminal sentencing. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). Mandatory minimums necessarily restrict the sentencing judge's traditional discretion in tailoring criminal punishment to the particular circumstances of the crime and the defendant. *See, e.g.*, American Bar Association Justice Kennedy Commission, REPORTS WITH RECOMMENDATIONS 6 (Aug 2004).

At the same time, as a practical matter, mandatory minimums shift a portion of judges' discretionary authority to prosecutors, who can exercise substantial control over a defendant's eventual sentence through their unreviewable charging decisions. *See id.* at 27; Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMERY OF RECENT FINDINGS 21 (1994) (Federal Judical Center Report) ("The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward

prosecution priorities, sometimes at the expense of other sentencing goals."); *see also* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284 (1997). Congress is aware of these effects. *See, e.g.*, U.S. Sentencing Commission, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). While imposing mandatory minimum sentences is plainly within Congress's constitutional authority, courts should not assume that Congress has exercised that authority to alter the traditional balance of sentencing roles and authority without a plain and unambiguous statement in the text of the statute.

Third, mandatory minimum sentence provisions of the sort at issue here – which turn on prior criminal history – give rise to especially important concerns about fair notice. It is not simply that defendants may lack notice about the consequences of their *federal* crime. Ambiguity in such provisions can also deprive defendants and their state lawyers of fair notice of the possible future consequences of plea bargaining decisions in state court. *Cf.* American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-1.4(c) (1999) ("[T]he court should also advise defendant that by entering the plea, the defendant may face additional consequence including . . . enhanced punishment if the defendant is convicted of another crime . . . . The court should advise the defendant to consult with defense counsel . . . concerning the potential consequences of the plea.").

C. The Rule of Lenity Requires Reading Sections 802(13) and 802(44) Together.

The court of appeals did not dispute that its interpretation of the statute in this case would be incompatible with the rule of lenity, if the rule was properly invoked. App. 8a. The court erred, however, in concluding that the statute was insufficiently ambiguous to warrant invocation of the rule. As the analysis in Part I, *supra*, demonstrates, the better reading of the 1994 conforming amendment is that Congress would have anticipated that the new definition it created in Section 802(44) would be read in light of the existing definition of "felony" in Section 802(13). At worst, however, the statute presents a genuine ambiguity, on that persists "even *after* resort to 'the language and structure, legislative history and motivating policies' of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted).

Even if, in the end, this Court were to share Chief Justice Marshall's suspicion that the interpretation required by the rule of lenity in this case is unlikely to be the one Congress's intended (assuming Congress has a clear intention at all), *see Wiltberger*, 18 U.S. at 105, that would not end the matter. Such doubt has never been a reason to abandon the judiciary's long-standing application of the doctrine. It remains open to Congress to revisit the statute and, if it intends a different scope for the enhancement provision, to make its intention clear through plain and unambiguous language. Given Congress's attentiveness to the issue of federal criminal sentencing and mandatory minimum sentences – as illustrated by the repeated amendments to Section 841(b)(1)(A) over the years – this Court has little reason to worry that a construction of the statute

Congress views to be unduly lenient would stand uncorrected for long.[19]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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January 22, 2008

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[19] *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2193-2207 (2002) (noting that if "courts broadly (or even neutrally) interpreted criminal statutes in cases of ambiguity, this would often produce an overly broad interpretation that would likely stick because there is no effective lobby for narrowing criminal statutes that can generally influence legislative drafting or get on the legislative agenda to get a statutory override. In contrast, an overly narrow interpretation is far more likely to be corrected by statutory interpretation because prosecutors and other members of anti-criminal lobbying groups are heavily involved in legislative drafting and can more readily get on the legislative agenda.").

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-4997

D.C. Docket No. CR-03-107

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KEITH LAVON BURGESS,
a/k/a Buck Black,
Defendant-Appellant.

Appeal from the United States District Court
District of South Carolina

(March 12, 2007)

Before: WILKINSON, NIEMEYER, and SHEDD, CIRCUIT JUDGES.

SHEDD, Circuit Judge:

Keith Lavon Burgess pled guilty to conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. In sentencing Burgess, the district court applied the enhanced 20-year mandatory minimum sentence required by 21 U.S.C. § 841(b)(1)(A) for an offense committed "after a prior conviction for a felony drug offense has become final." Burgess now appeals, arguing primarily that the district court erroneously applied the 20-year mandatory minimum because his prior South Carolina conviction for cocaine possession, which is the predicate offense supporting the enhancement, is classified under state law as a misdemeanor and, therefore, is not a "felony drug offense" within the meaning of § 841(b)(1)(A). We disagree. The term "felony drug offense" is specifically and unambiguously defined in 21 U.S.C. § 802(44) for purposes of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, and Burgess's prior cocaine possession conviction fits squarely within that definition. Accordingly, we affirm.

I

Under § 841(b)(1)(A), a conviction rendered pursuant to § 841(a)(1) involving 50 grams or more of cocaine base results in a mandatory minimum 10-year

prison sentence.[1] Section 841(b)(1)(A) further provides that if the defendant committed the offense "after a prior conviction for a felony drug offense has become final," the mandatory minimum is enhanced to 20 years. Although § 841 does not define "felony drug offense," § 802(44) defines it for purposes of the CSA as "an offense that is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to narcotic drugs . . . ."

Burgess's Presentence Report ("PSR") calculated his sentencing guidelines range to be 151-188 months based on a total offense level of 31 and a criminal history category of IV. Before sentencing, the government filed an Information pursuant to 21 U.S.C. § 851 notifying Burgess that he was subject to the § 841(b)(1)(A) 20-year mandatory minimum because of his prior conviction under S.C. Code Ann. § 44-53-370(d)(1) for misdemeanor possession of cocaine. Burgess received a one-year sentence for that conviction, but the maximum possible sentence was two years. *See id.* The PSR was amended to reflect the enhancement, and Burgess objected, asserting (inter alia) that his prior cocaine possession conviction is not

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[1] "Section 841(b)(1) provides penalties not only for violations of § 841, but also for transgressions of § 846 that involve a conspiracy to commit an offense defined in § 841." *United States v. Stokes*, 261 F.3d 496, 499 n.4 (4th Cir. 2001).

a "felony drug offense" within the meaning of § 841(b)(1)(A).

Specifically, Burgess argued that even though § 802(44) defines "felony drug offense" as being "an offense that is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to narcotic drugs," the term as used in § 841(b)(1)(A) is ambiguous because another CSA definition provision, 21 U.S.C. § 802(13), defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." Invoking the rule of lenity, which provides that "an ambiguous criminal statute is to be construed in favor of the accused," *Staples v. United States*, 511 U.S. 600, 619 n.17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), Burgess contended that "felony drug offense" in § 841(b)(1)(A) must be defined by incorporating the § 802(13) definition of "felony" into the § 802(44) definition of "felony drug offense," and such a reading mandates that the § 841(b)(1)(A) enhanced mandatory minimum applies only when a prior conviction is both classified as a felony *and* punishable by more than one year of imprisonment. Because his prior cocaine possession conviction is classified as a misdemeanor under S.C. Code Ann. § 44-53-370(d)(1), Burgess maintained that it is not a "felony drug offense."

The district court overruled this objection, concluding that "felony drug offense" for purposes of § 841(b)(1)(A) is defined by § 802(44) without reference to § 802(13). Because the prior cocaine possession conviction was punishable by more than one year of

imprisonment, the district court applied the § 841(b)(1)(A) enhancement and increased the mandatory minimum from 10 to 20 years. After granting a downward departure motion made by the government based on substantial assistance, the district court sentenced Burgess to 156 months of imprisonment.

Burgess thereafter noticed this appeal, and his attorney filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that there are no meritorious issues for appeal, but raising two issues, one of which is the propriety of the § 841(b)(1)(A) enhancement.[2] After reviewing the entire record in accord with *Anders*, we directed the government to file a responsive brief, and we notified Burgess of his right to file a pro se supplemental brief in an *Anders* case (which he did not do).

Subsequent to Burgess's sentencing, two federal appellate courts considered the precise issue now before us, reaching conflicting results. Consistent with Burgess's position below and on appeal, the D.C. Circuit applied the rule of lenity and held that "felony

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[2] Burgess's attorney also raised the propriety of Burgess's base offense level calculation under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In light of our determination that the district court properly applied the 20-year mandatory minimum, we need not consider the *Booker* issue further.

drug offense," as used in § 841(b)(1)(A), is defined by §§ 802(13) and 802(44); under this reasoning, the applicability of the enhancement is limited "to those instances in which the prior drug offense is *both* punishable by more than one year and classified as a felony by the controlling authority." *United States v. West*, 393 F.3d 1302, 1315 (D.C. Cir. 2005). Rejecting this approach, the First Circuit held that "the definition of 'felony drug offense' contained in § 802(44) unambiguously controls for the purposes of determining whether the penalty enhancement in § 841(b)(1)(A) is triggered" and, therefore, the enhancement applies when the defendant has a prior drug conviction that is punishable by more than one year of imprisonment, regardless of how the offense is classified. *United States v. Roberson*, 459 F.3d 39, 51 (1st Cir. 2006), *cert. denied*, ____ U.S. ____, ____ S. Ct. ____, ____ L.Ed.2d ____, 2007 WL 506174 (Feb. 20, 2007). The parties have cited these cases in support of their respective positions, and the courts' opinions thoroughly detail their underlying rationales. *See Roberson*, 459 F.3d at 50-55; *West*, 393 F.3d at 1310-15.

II

The district court's interpretation of "felony drug offense," as it is used in § 841(b)(1)(A), involves a pure question of law, which we review de novo. *Ramey v. Director, O.W.C.P.*, 326 F.3d 474, 476 (4th Cir. 2003). Using common sense as a guide, *Kofa v. I.N.S.*, 60 F.3d

1084, 1088 (4th Cir. 1995) (en banc), "[o]ur first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). We determine the "plainness or ambiguity of statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. 843. "Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.* at 340, 117 S.Ct. 843 (internal quotation marks omitted). In most instances, "[s]tatutory definitions control the meaning of statutory words," *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201, 69 S.Ct. 503, 93 L.Ed. 611 (1949), and "[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning," *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). Moreover, a statutory definition "which declares what a term means . . . excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n. 10, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) (internal quotation marks omitted).

As we have noted, § 841 does not define "felony drug offense," but § 802(44) does in plain and unambiguous terms:

> The term "felony drug offense" means an offense that is punishable by

> imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Like the First Circuit, whose reasoning we adopt, we believe that "[b]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." *Roberson*, 459 F.3d at 52. We discern no basis from the plain language or statutory scheme of the CSA to indicate that Congress intended "felony drug offense" also to incorporate the definition in § 802(13). We also reject Burgess's attempt to invoke the rule of lenity because we find that there is no "grievous ambiguity or uncertainty" in the pertinent statutes. *See Muscarello v. United States*, 524 U.S. 125, 138-39, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998) ("To invoke the rule [of lenity], we must conclude that there is a grievous ambiguity or uncertainty in the statute." (internal quotation marks omitted)).[3]

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[3] Apart from the foregoing, we reject Burgess's argument that the § 802(13) definition of "felony" must be incorporated into § 802(44) for an additional reason. In *United States v. Amaya-Portillo*, 423 F.3d 427 (4th Cir. 2005), we considered whether a state conviction for cocaine possession qualifies as an "aggravated

In light of our interpretation of § 841(b)(1)(A), Burgess's prior conviction for cocaine possession constitutes a "felony drug offense." Accordingly, the district court correctly applied the 20-year mandatory minimum to his sentence.

III

Based on the foregoing, we affirm the conviction and sentence. We direct counsel to inform Burgess, in writing, of the right to petition the Supreme Court of the United States for further review. If Burgess requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel

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felony" under U.S.S.G. § 2L1.2 if it is a misdemeanor under the applicable state law and punishable only as a misdemeanor under the CSA. Resolution of this issue required us ultimately to determine for purposes of 18 U.S.C. § 924(c) what constitutes a "drug trafficking crime," which is defined as "any felony punishable under the [CSA]." We concluded that § 802(13)—without reference to § 802(44)—provides the definition of "felony" under the CSA. Looking to §§ 802(13) and 802(44), we explained that "felony" and "felony drug offense" "are two different terms with different definitions under the CSA," and that a state offense can be a "felony drug offense" but not a "felony." 423 F.3d at 435. Because Burgess's argument is necessarily predicated on reading the § 802(13) definition of "felony" into the § 802(44) definition of "felony drug offense," our analysis in *Amaya-Portillo* negates his argument.

may move for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Burgess.

AFFIRMED.

APPENDIX B

This appendix provides the relevant text of versions of 21 U.S.C. §§ 802 and 841(b)(1)(A), as originally codified, as amended in 1984 and 1988, and in its present form.

1. As enacted in 1970:

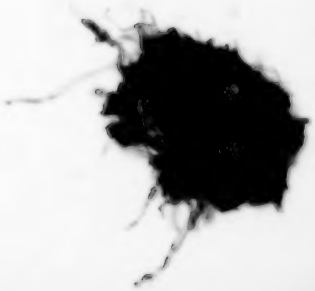
§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 841(b)(1)(A): If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both.

2. As amended in 1984:

§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 841(b)(1)(A): If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or simulating substances have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both.



3. As amended in 1988:

§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 841(b)(1)(A): If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment . . . For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

4. Present version, as amended in 1994:

§ 802(13): The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

§ 802(44): The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs . . . .

§ 841(b)(1)(A): If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which not be less than 20 years . . . .

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No. 06-11429

In the Supreme Court of the United States

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a state drug offense that is punishable by more than one year of imprisonment must also be classified as a "felony" under state law in order to qualify as a "felony drug offense" for purposes of the recidivist sentencing provisions of 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005).

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In the Supreme Court of the United States

No. 06-11429

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 478 F.3d 658.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 2007. The petition for a writ of certiorari was filed on May 17, 2007, and was granted on December 7, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App, *infra*, 1a-4a.

STATEMENT

Petitioner was convicted of conspiracy to possess with the intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)[1] and 846. He had previously been convicted of cocaine possession under South Carolina law, an offense that was punishable by up to two years of imprisonment. Pet. App. A2. The district court determined that petitioner was subject to a mandatory minimum 20-year sentence under 21 U.S.C. 841(b)(1)(A) because his South Carolina conviction was a conviction for a "felony drug offense." C.A. App. 35-36, 64-68. The court of appeals affirmed, explaining that 21 U.S.C. 802(44) specifically defines "felony drug offense" as an offense "punishable by imprisonment for more than one year" under a law that "prohibits or restricts conduct" relating to drugs. Pet. App. A1-A7. This Court has granted review of that holding.

1. Under the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, it is unlawful for any person to "knowingly or intentionally" "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). Any person who conspires to commit such an offense is "subject to the same penalties as those prescribed for the offense." 21 U.S.C. 846.

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[1] The relevant portions of the key sentencing statutes—21 U.S.C. 841(b)(1)(A) and 21 U.S.C. 802(44)—are unchanged from the time of petitioner's offense conduct, conviction, and sentence. Therefore, unless otherwise noted, all citations to 21 U.S.C. 841(b)(1)(A) refer to 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005) and all citations to 21 U.S.C. 802(44) refer to 21 U.S.C. 802(44) (Supp. V 2005).

The CSA provides for enhanced penalties for recidivists. For example, if a person commits a violation of 21 U.S.C. 841(a) involving 50 grams or more of cocaine base "after a prior conviction for a felony drug offense has become final," that person is subject to a minimum term of imprisonment of 20 years and a maximum term of life imprisonment. 21 U.S.C. 841(b)(1)(A). The CSA defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44).

2. In October 2002, petitioner offered to sell cocaine to a Drug Enforcement Agency confidential source (CS). Presentence Investigation Report (PSR) ¶ 9. The CS asked petitioner the price of "half a big"—*i.e.*, 2.25 ounces—and petitioner replied that he would sell the CS that amount of either powder cocaine or crack cocaine for $1700. *Ibid.*

A few days later, the CS met petitioner again. PSR ¶ 10. Petitioner showed the CS four ounces of powder cocaine and four ounces of crack cocaine, and he told the CS to call him whenever he was ready to make a purchase. *Ibid.* Petitioner explained that his source of supply was a Jamaican from Miami, Florida, whom petitioner had met in prison. *Id.* ¶ 11. Petitioner also mentioned that he sold or otherwise distributed more than five kilograms of powder cocaine and crack cocaine per week. *Ibid.*

In December 2002, in a controlled, monitored, and recorded call to petitioner's cell phone, the CS inquired about purchasing nine ounces of crack cocaine for $6500. PSR ¶¶ 12-13. Petitioner agreed to sell that amount,

and petitioner and the CS made arrangements to meet the following day. *Id.* ¶¶ 13-14. The next day, petitioner and a co-conspirator met the CS in the parking lot of a shopping mall, and then left to go to petitioner's apartment to retrieve the drugs. *Id.* ¶ 15. When petitioner did not return after 45 minutes, the CS called petitioner, who explained that he and his associate were still "cooking" the cocaine into crack. *Id.* ¶ 16. About an hour later, petitioner returned to the mall parking lot and provided the CS with two Ziploc bags containing 240.3 grams of cocaine base in exchange for $2000. *Id.* ¶¶ 16-17, 19. Petitioner was arrested shortly thereafter. *Id.* ¶ 19.

Petitioner had previously been convicted of other crimes. In 1999, petitioner was convicted of two counts of federal bank robbery, offenses for which he was still on supervised release when he committed the instant offense. PSR ¶¶ 39, 42. In 2002, petitioner was convicted of possession of cocaine under South Carolina law. Pet. App. A2; PSR ¶ 40; see S.C. Code Ann. § 44-53-370(c) and (d)(1) (2000). The government filed an information pursuant to 21 U.S.C. 851 identifying petitioner's South Carolina drug conviction as subjecting him to enhanced penalties under 21 U.S.C. 841(b)(1)(A). C.A. App. 13.

3. Petitioner pleaded guilty to conspiracy to possess with the intent to distribute and conspiracy to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and 846. C.A. App. 9-12 (indictment); *id.* at 14-20 (plea agreement).

At sentencing, the district court determined that petitioner was subject to a statutory 20-year mandatory minimum sentence because his South Carolina cocaine offense qualifies as a "felony drug offense." The court

explained that 21 U.S.C. 841(b)(1)(A) requires an enhancement if an offender had previously committed a "felony drug offense," and the CSA specifically defines "felony drug offense" as an offense that is punishable by a term of imprisonment of one year or more under a law that prohibits conduct relating to illegal drugs. C.A. App. 35-36 (citing 21 U.S.C. 802(44)). Because possession of cocaine was a drug offense punishable under South Carolina law by up to two years of imprisonment, the court determined that petitioner had committed a "felony drug offense" and the sentence enhancement therefore applied. *Id.* at 39-40.

The district court rejected petitioner's argument that, because a different provision in the CSA—21 U.S.C. 802(13)—defines a "felony" as an offense "classified by applicable Federal or State law as a felony," and South Carolina law categorized petitioner's prior offense as a misdemeanor, his prior offense was not a "felony drug offense" for purposes of Section 841(b)(1)(A). C.A. App. 27-36. The court reasoned that because "felony drug offense" is the term Congress used in Section 841(b)(1)(A), and Section 802(44) defines that precise term, only the definition in Section 802(44) applied. *Id.* at 35-36.

The court then granted the government's motion for a downward departure based on petitioner's substantial assistance in the prosecution of another person, see 18 U.S.C. 3553(e) (Supp. II 2002), and sentenced petitioner to 156 months of imprisonment, to be followed by ten years of supervised release. Pet. App. A3-A4; C.A. App. 53-61.

4. The court of appeals affirmed. Pet. App. A1-A7. It first noted that a conviction for a violation of 21 U.S.C. 841(b)(1)(A) involving 50 grams or more of co-

caine base carries a mandatory sentence of ten years of imprisonment, and the mandatory sentence increases to 20 years if the offense was committed "after a prior conviction for a felony drug offense became final." Pet. App. A2. The court then determined that petitioner qualified for the 20-year mandatory minimum sentence because his South Carolina conviction for possession of cocaine was a "felony drug offense." *Id.* at A5-A6.

The court of appeals explained that because Section 802(44) defines "felony drug offense" in "plain and unambiguous terms," and Section 841(b)(1)(A) "makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." Pet. App. A5 (quoting *United States* v. *Roberson*, 459 F.3d 39, 52 (1st Cir. 2006), cert. denied, 127 S. Ct. 1261 (2007)). The court noted that the CSA separately defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony," *id.* at A3 (quoting 21 U.S.C. 802(13)), but it "discern[ed] no basis from the plain language or statutory scheme * * * to indicate that Congress intended 'felony drug offense' also to incorporate the definition in § 802(13)," *id.* at A6. The court rejected petitioner's attempt to invoke the rule of lenity, finding that the rule had no application in cases, like this one, where there is "no 'grievous ambiguity or uncertainty' in the pertinent statutes." *Ibid.* (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998)).

SUMMARY OF ARGUMENT

Petitioner's prior conviction for possession of cocaine qualifies as a "felony drug offense" under 21 U.S.C. 841(b)(1)(A) because that offense is "punishable by im-

prisonment for more than one year" under a state law that "prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44).

A. From the plain text of the statute, it is clear that a "felony drug offense" is a drug offense punishable by more than one year of imprisonment, regardless of how it is classified under state law. The trigger for a sentence enhancement under Section 841(b)(1)(A) is a "felony drug offense," and Congress provided a clear definition of that exact term in Section 802(44).

The statute's text provides no support for augmenting the definition of "felony drug offense" with the definition of "felony" provided in 21 U.S.C. 802(13). The definition of a felony in that subsection requires that the previous offense be classified under applicable state or federal law as a felony. But Congress did not use the word "felony" in the definition it supplied for the term of art "felony drug offense" in Section 802(44). Rather, it captured the concept of a felony in that subsection by referring to the *length* of the sentence by which the prior drug offense is punishable—*i.e.*, that it be punishable by more than one year of imprisonment. That is the usual line between a felony and a misdemeanor in federal criminal law, see 18 U.S.C. 3559(a); *Lopez* v. *Gonzales*, 127 S. Ct. 625, 630 n.4 (2006), and it provides a consistent standard for use across the range of state, federal, and foreign convictions covered. Congress required only a "felony drug offense" to trigger an enhanced sentence under Section 841(b)(1)(A), and it defined that term specifically. To apply both statutory definitions, as petitioner suggests, would create anomalies and ambiguities where none exists. In particular, it would create serious uncertainty about whether foreign

offenses (which frequently are not classified as felonies or misdemeanors) could be invoked for sentence enhancement, and, if so, how they would qualify.

B. The government's interpretation of Section 802(b)(1)(A) is bolstered by the context of the CSA as a whole. The definition of "felony drug offense" in Section 802(44) applies throughout the CSA and its neighboring statute, the Controlled Substance Import and Export Act (Import Act), 21 U.S.C. 951 *et seq.* Numerous provisions in the CSA and Import Act provide for an enhanced sentence if the offender has previously been convicted of a "felony drug offense." Rather than redefine the term "felony drug offense" in each such provision, Congress defined the term once, in Section 802(44), and used identical language in each sentence-enhancement provision to reference that definition. None of those provisions also requires that the offense that triggers an enhancement be classified as a "felony." The unadorned (and defined) term "felony," in contrast, is used for a variety of other purposes throughout the CSA and Import Act.

C. The drafting history of CSA makes clear that Section 802(44) provides the sole definition of "felony drug offense" for purposes of the sentence-enhancement provisions of Section 841(b)(1)(A). After previously defining a "felony drug offense" as "a felony" that had particular characteristics, Congress changed course in 1994 and substituted in the definition section a punishment-based description, *i.e.*, that the offense be punishable by more than one year of imprisonment. Congress applied that change throughout the CSA and Import Act through a series of conforming amendments that moved the definition of "felony drug offense" from Section 841(b)(1)(A) to Section 802 and changed the language of

other key sentence-enhancement provisions in the CSA and Import Act to mirror the language in Section 841(b)(1)(A). Taken together, those changes make clear that Congress intended to define a "felony drug offense" solely by reference to the specially-crafted language in Section 802(44).

D. Congress's decision to define a "felony drug offense" as a drug offense punishable by more than one year of imprisonment serves important purposes. It authorizes enhanced sentences to punish and deter repeat drug offenders, while bringing a measure of uniformity to those sentences by basing them on authorized terms of imprisonment rather than on the peculiarities of how they are classified under the law of the punishing jurisdiction. Petitioner suggests that Congress would not have intended to encompass drug possession offenses, which he considers minor, within "felony drug offenses." But the text of the CSA clearly reflects Congress's policy judgment that those crimes, when subject to felony-level punishment by the applicable jurisdiction, are, regardless of label, not minor. It is not a proper approach to statutory interpretation for courts to nullify that determination on policy grounds.

E. The rule of lenity does not apply in this case. In the case of a statute authorizing a mandatory minimum sentence for a recidivist, the rule of lenity has little force, both as a policy matter and as a historical matter. In any event, the rule of lenity is not applicable here because there is no grievous ambiguity in the statutory language. Congress provided a straightforward definition of "felony drug offense" in the CSA and used that precise term to trigger a mandatory minimum sentence in Section 841(b)(1)(A). That unambiguous reference precludes resort to the rule of lenity.

ARGUMENT

PETITIONER'S PRIOR CONVICTION FOR POSSESSION OF COCAINE QUALIFIES AS A "FELONY DRUG OFFENSE" UNDER 21 U.S.C. 841(b)(1)(A)

The court of appeals correctly concluded that an offense is a "felony drug offense" for purposes of the sentence-enhancement provision of 21 U.S.C. 841(b)(1)(A) if it meets the requirements set forth in the definition of "felony drug offense" in 21 U.S.C. 802(44). A qualifying offense is not also required to meet the separate definition of a "felony" in 21 U.S.C. 802(13). The statutory text, context, history, and purposes are all consistent with the view that Congress intended Section 802(44) to provide the exclusive definition of "felony drug offense." In the face of Congress's clear intent, the rule of lenity has no application in this case.

A. The Plain Text Of Section 841(b)(1)(A) Provides For Enhanced Punishment For A "Felony Drug Offense" As That Term Is Defined In 21 U.S.C. 802(44)

"As in any case of statutory construction, [this Court's] analysis begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). And where "the statutory language provides a clear answer, it ends there as well." *Ibid.* In this case, the language Congress chose makes clear that petitioner's prior offense is a "felony drug offense" that triggers an enhanced sentence under Section 841(b)(1)(A).

1. a. The CSA makes it unlawful "for any person knowingly or intentionally" to "manufacture, distribute, or dispense, or possess with intent to manufacturer, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). The "penalties" provision of Section 841 pro-

vides that any person who violates that section through conduct involving, *inter alia*, 50 grams or more of a mixture containing cocaine base, "shall be sentenced to a term of imprisonment which may not be less than 10 years." 21 U.S.C. 841(b)(1)(A). The mandatory penalty is enhanced to 20 years of imprisonment if the violation was committed "after a prior conviction for a *felony drug offense* has become final." *Ibid.* (emphasis added).

Whether an offender's punishment should be enhanced under Section 841(b)(1)(A) thus depends upon whether the offender previously committed a "felony drug offense." The CSA helpfully defines that precise term:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. 802(44). The definition provides a complete description of the type of offenses covered, referring to the length of authorized punishment, the nature of the proscribed conduct, and the jurisdiction supplying the law. No further requirements need be met for a crime to constitute a "felony drug offense."

b. The explicit, precise definition of "felony drug offense" as a term of art in Section 802(44) clearly applies to that exact term as used in Section 841(b)(1)(A). It is well-settled that "[s]tatutory definitions control the meaning of statutory words." *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). "When a statute includes an explicit definition, [courts] must follow

that definition, even if it varies from that term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000); see, *e.g.*, *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 502 (1945) ("Of course, statutory definitions of terms used therein prevail over colloquial meanings."); 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland: Statutes and Statutory Construction* § 47:7, at 298-299 (7th ed. 2007) ("[s]tatutory definitions * * * establish meaning where the terms appear in that same act").

Section 802(44) itself makes clear that its definition provides the exclusive meaning of a "felony drug offense" under the CSA. That subsection states that "the term 'felony drug offense' *means*" a drug offense punishable by more than one year of imprisonment. 21 U.S.C. 802(44) (emphasis added). "As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979) (internal quotation marks omitted); see *Meese* v. *Keene*, 481 U.S. 465, 484-485 (1987); *Sutherland: Statutes and Statutory Construction*, *supra*, § 47:7, at 299. Not surprisingly, the courts of appeals have routinely assumed that Section 802(44) provides the exclusive definition for the term "felony drug offense," as it is used in Section 841(b)(1).[2]

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[2] See, *e.g.*, *United States* v. *Rosales*, No. 05-30260, 2008 WL 375207, at *7-*8 (9th Cir. Feb. 13, 2008); *United States* v. *Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007); *United States* v. *Jackson*, 504 F.3d 250, 253 (2d Cir.), cert. denied, 128 S. Ct. 690 (2007); *United States* v. *Huskey*, 502 F.3d 1196, 1198 (10th Cir. 2007); *United States* v. *Brown*, 500 F.3d 48, 59 (1st Cir. 2007); *United States* v. *Nelson*, 484 F.3d 257, 260 (4th Cir.), cert. denied, 128 S. Ct. 614 (2007); *United States* v. *Curry*, 404 F.3d 316, 318 (5th Cir.), cert. denied, 544 U.S. 1067 (2005); *United States* v. *Sampson*, 385 F.3d 183, 194 (2d Cir. 2004), cert. denied, 544 U.S. 924 (2005); *United States* v. *Richards*, 302 F.3d 58, 70-71 (2d Cir. 2002);

c. Nothing in the statute suggests that the meaning of the phrase "felony drug offense" must be supplemented by applying separate definitions from some other part of the CSA. The definition of "felony drug offense" that Congress provided is coherent and complete, because it gives meaning to each of the three words in that phrase. First, Congress used the word "felony" to describe the seriousness of the offense, and the definition states that the offense must be "punishable by imprisonment for more than one year" under state, federal, or foreign law. 21 U.S.C. 802(44). That comports with the general definition of felony in federal criminal law, see 18 U.S.C. 3559(a); *Lopez* v. *Gonzales*, 127 S. Ct. 625, 630 n.4 (2006), as well as the common definition of "felony." See *Black's Law Dictionary* 651 (8th ed. 2004) (defining "felony" as "[a] serious crime usu[ally] punishable by imprisonment for more than one year or by death"); see also, *e.g.*, *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 904 (9th Cir. 2002) (noting Congress's "longstanding practice of equating the term 'felony' with offenses punishable by more than one year's imprisonment"). Second, Congress used the word "drug" to describe the type of prohibited conduct, and

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United States v. *Maynie*, 257 F.3d 908, 919 n.5 (8th Cir. 2001), cert. denied, 534 U.S. 1151, and 535 U.S. 944 (2002); *United States* v. *Meza-Corrales*, 183 F.3d 1116, 1126 (9th Cir. 1999); *United States* v. *Martinez*, 182 F.3d 1107, 1113 & n.6 (9th Cir.), cert. denied, 528 U.S. 944 (1999); *United States* v. *Spikes*, 158 F.3d 913, 931 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999); *United States* v. *Mankins*, 135 F.3d 946, 949 (5th Cir. 1998); *United States* v. *Sandle*, 123 F.3d 809, 810-811 (5th Cir. 1997); see also *United* States v. *Roberson*, 459 F.3d 39, 50-55 (1st Cir. 2006), cert. denied, 127 S. Ct. 1261 (2007) (holding that only Section 802(44), and not Section 802(13), informs the meaning of "felony drug offense" in Section 841(b)(1)(A)); but see also *United States* v. *West*, 393 F.3d 1302, 1311-1315 (D.C. Cir. 2005).

the definition provides that it must be conduct "relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44); see, *e.g.*, *Black's Law Dictionary, supra*, at 535 (defining "drug" as "[a] natural or synthetic substance that alters one's perception or consciousness," and referencing the definition of "controlled substance"). Finally, Congress used the word "offense" to signify conduct that is criminal, and the definition states that the conduct must be "punishable * * * under any law of the United States or of a State or foreign country." 21 U.S.C. 802(44); see, *e.g.*, *Black's Law Dictionary, supra*, at 1110 (defining "offense" as "[a] violation of the law; a crime"). Because Congress's definition of "felony drug offense" is complete and coherent, there is no reason for this Court "to suspend the respect [it] normally owe[s] to the Legislature's power to define the terms that it uses in legislation." *Meese*, 481 U.S. at 484. And because Congress did not use *in the definition* any terms that it defined elsewhere, there is no basis for looking to those terms to supplement the definition of "felony drug offense."

2. Petitioner contends (Br. 9-16) that the term "felony drug offense" as used in Section 841(b)(1)(A) takes its meaning not only from the provision of the CSA that specifically defines that three-word term of art, *i.e.*, Section 802(44), but also from a separate provision, Section 802(13), which defines the term "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). In petitioner's view, the sentence enhancement in Section 841(b)(1)(A) applies only when a defendant's prior conviction is punishable by more than one year in prison *and* that prior conviction was classified as a felony under applicable state

or federal law. Under that interpretation of the CSA, petitioner's prior state cocaine possession conviction would not qualify as a "felony drug offense" for purposes of the sentencing enhancement in Section 841(b)(1)(A), because the applicable South Carolina law classifies that offense as a misdemeanor. Petitioner's effort to inject confusion into a statutory definition of a term of art is mistaken.

a. Petitioner's reading cannot be squared with the statute's text. Congress defined both the terms "felony" and "felony drug offense" in the CSA, gave them different meanings, and it used only the latter in Section 841(b)(1)(A). That use of the three-word, defined phrase "felony drug offense" unmistakably signals Congress's choice to use only that definition to trigger a sentence enhancement. See pp. 10-14, *supra*. "[T]here would be little use in" Congress's providing a specific definition of "felony drug offense" if courts "were free in despite of it to choose a meaning for [them]selves." *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95-96 (1935). When such a phrase has a specific definition as a term of art, courts are not at liberty to use definitions of constituent words in the defined phrase to inject ambiguity or confusion.

Because neither Section 802(44) nor Section 841(b)(1)(A) requires that an offense be classified as a felony (as defined in Section 802(13)) in order to qualify as a "felony drug offense," petitioner's argument would require this Court to insert words into the definition to add that requirement. But this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997); see *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008). That is particularly true with respect to statutory interpretations that would make

federal treatment of an offense depend upon how the offense is characterized under state law. See, *e.g.*, *United States* v. *Turley*, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."); see also, *e.g.*, *Lopez*, 127 S. Ct. at 629-633 (finding "no hint in the statute's text that Congress was courting * * * state-by-state disparity"); *Taylor* v. *United States*, 495 U.S. 575, 591 (1990) (declining to depart from Congress's "general approach" of using categorical definitions not dependent on state law, absent a "clear indication" to that effect). Indeed, when Congress intends to make a federal criminal provision depend upon a feature of state law, it generally says so. See, *e.g.*, 18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005) (defining "misdemeanor crime of domestic violence" as an offense that "is a misdemeanor under Federal, State, or Tribal law"); see also, *e.g.*, 18 U.S.C. 921(a)(20) ("What constitutes a conviction of [a defined] crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."); *Logan* v. *United States*, 128 S. Ct. 475, 479-480, 485 (2008) (Congress specifically amended Section 921(a)(20) to reject this Court's holding in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1983), that the predecessor version did not allow "state law [to] * * * determine the present impact of a prior conviction.").

b. If Congress had intended the definition in Section 802(44) to include by cross-reference the definition in Section 802(13), there are numerous ways it could have done so. First, Congress could have added words to the definition in Section 802(44) to include the word "felony" and thus pick up the definition in Section 802(13). For

example, Congress could have changed Section 802(44) to read: "The term 'felony drug offense' means a felony * * *." Or it could have said: "The term 'felony drug offense' means any Federal or State offense classified by applicable Federal or State law as a felony that is punishable by imprisonment for more than one year * * *." See *Roberson*, 459 F.3d at 52-53 (suggesting similar alternatives).

Alternatively, Congress could have drafted Section 841(b)(1)(A) in a way that would have incorporated Section 802(13). It could have said, for example, that a mandatory minimum sentence applies if a person commits his offense "after a prior conviction for a felony drug offense that is classified by applicable Federal or State law as a felony has become final." See *Roberson*, 459 F.3d at 53. Or Congress could have defined only the term "drug offense" in Section 802(44), then used the phrase "felony drug offense" in Section 841(b)(1)(A), in which case the phrase "felony drug offense" would be defined by reference to both the definition of "drug offense" in Section 802(44) and the definition of "felony" in Section 802(13). *Ibid.* Congress did none of those things.

Congress has, in other statutes, demonstrated its ability to make one defined term include another, which it has accomplished by placing the second term in the definition of the first. See, *e.g.*, 18 U.S.C. 1956(c)(3) and (4) (first defining "transaction," then defining "financial transaction" as "a transaction which" meets certain additional requirements); 18 U.S.C. 1961(1) (Supp. II 2002) and 18 U.S.C. 1961(5) (defining "racketeering activity," then defining "pattern of racketeering activity" as including, *inter alia*, "at least two acts of racketeering activity"). In contrast, petitioner has not noted *any* in-

stances in which Congress has defined one term to include another by placing the second term in the first phrase to be defined, rather than in the text of its definition.

Further, Congress has, in other contexts, used clear language to make sentence enhancements depend upon an offense's classification under state or federal law. For example, in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) *et seq.*, Congress provided for enhanced penalties if an offender has previously committed a "violent felony," defined as certain "crime[s] punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). Congress then specified, however, that the term "crime punishable by imprisonment for a term exceeding one year" excludes "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," 18 U.S.C. 921(a)(20)(B). Thus, in the ACCA, Congress made a sentence enhancement generally depend on the term of imprisonment imposed, but then exempted offenses that were classified as misdemeanors and punished by relatively short prison terms under state law. That is precisely the intention that petitioner attributes to Congress in this case. See Pet. Br. 14, 16, 17-23. The fact that Congress chose not to use such a formulation in the CSA, but rather to define "felony drug offense" solely by reference to the authorized term of imprisonment, makes clear that Congress did not intend to exempt offenses classified as misdemeanors under state law from categorization as "felony drug offenses." See also 21 U.S.C. 862a (stating that any person "convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the

possession, use, or distribution of a controlled substance * * * shall not be eligible for" certain federal benefits).

c. There is no textual basis for importing Section 802(13)'s requirement that an offense be classified by state law as a felony into Section 841(b)(1)(A). Petitioner first suggests (Br. 13-14) that the word "felony" in the defined term "felony drug offense" signals Congress's intent to import the Section 802(13) definition of "felony." But Congress did *not* include the word "felony" in the *definition* of a felony drug offense, which is how it would have accomplished that importation. Rather, Congress used the more-than-one-year-of-imprisonment formulation—with the obvious consequence of adopting an objective time-based felony/misdemeanor line that is not dependent on the vagaries of state classifications and labels.

Petitioner alternatively proposes (Pet. 14-15) to import the definition of "felony" in Section 802(13) through the noun "offense" found in the phrase "an offense punishable by imprisonment for more than one year," which appears in the definition of "felony drug offense" in Section 802(44). But not every "offense" is a felony, see, *e.g.*, 22 C.J.S. *Criminal Law* § 3 (2008), and it would be strange for Congress to go to the trouble of specifying that a criminal offense (of any description) qualifies if it is punishable by more than one year of imprisonment if what it actually meant to do was obliquely incorporate the defined term "felony."

Moreover, importing the definition of "felony" in Section 802(13) in either of the ways petitioner envisions would disregard Congress's deliberate choice to use a different way of defining felony (*i.e.*, by authorized term of imprisonment rather than by its classification under state or federal law) in Section 802(44). There is no rea-

son to adopt the strained, atextual reading of the statute that petitioner suggests in light of the fact that Congress has carefully chosen to use the phrase "felony drug offense" and has given it a sensible definition in Section 802(44).

d. Petitioner's proposals would create ambiguity where none exists. That is because, *inter alia*, importing Section 802(13) into the definition of "felony drug offense" would raise questions about whether a prior foreign offense can be a "felony drug offense." In Section 802(44), the term "felony drug offense" includes state, federal, and foreign offenses. See 21 U.S.C. 802(44) (offense must be "punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country"). In Section 802(13), by contrast, a "felony" is "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13).

Petitioner's reading of the statute would create significant uncertainty about the status of foreign offenses. Indeed, the classification requirement in Section 802(13) makes little sense with respect to foreign offenses, because many foreign countries, unlike the United States, do not distinguish between felonies and misdemeanors in their criminal laws. See, *e.g.*, *Patel* v. *INS*, 542 F.2d 796, 798 (9th Cir. 1976) (rejecting an interpretation of an immigration statute requiring classification of foreign offenses as felonies or misdemeanors); see also Bureau of Justice Statistics, *The World Factbook of Criminal Justice Systems* (visited Feb. 21, 2008) <http://www.ojp.usdoj.gov/bjs/abstract/wfcj.htm#abstract> (nations that do not classify offenses as felonies or misdemeanors include, *inter alia*, Canada, Denmark, Italy, Sweden, Finland, England and Wales, New Zealand, and Singa-

pore). Courts considering whether a previous foreign offense is a "felony drug offense" therefore would have to find either that no foreign offense can be a "felony drug offense" in a jurisdiction that does not classify offenses that way, thus reading the foreign-offense provision out of Section 802(44) entirely, or that Section 802(13)'s classification requirement has no application to foreign offenses. Either option would do significant violence to the statute's text and would be contrary to Congress's purpose of treating similarly situated recidivists the same, see pp. 33-35, *infra*. The significant interpretative difficulties created by petitioner's reading of the statute thus provide yet another reason why it should not be adopted.

In sum, if Congress had intended that an offense be classified as a felony under state or federal law in order to qualify as a "felony drug offense," "it would have found a much less misleading way to make its point." *Lopez*, 127 S. Ct. at 631.

B. The Statutory Context Supports The View That 21 U.S.C. 802(44) Provides The Exclusive Definition Of "Felony Drug Offense"

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (internal quotation marks omitted). In this case, the government's reading of the plain text of the statute is bolstered by the context in which the term "felony drug offense" appears in the CSA and Import Act.

1. The placement and use of the term "felony drug offense" in the CSA and in the Import Act confirms that

Section 802(44) provides the exclusive definition for that term. Chapter 13 of Title 21, United States Code, "Drug Abuse Prevention and Control," is divided into two subchapters, Subchapter I, "Control and Enforcement," 21 U.S.C. 801-904, which encompasses the CSA, and Subchapter II, "Import and Export," 21 U.S.C. 951-971, which covers the Import Act. Together the CSA and Import Act provide a comprehensive regime for "combat[ting] the international and interstate traffic in illicit drugs." *Gonzales* v. *Raich*, 545 U.S. 1, 12 (2005).

Congress used the term "felony drug offense" throughout the penalty provisions of the CSA and Import Act to provide for enhanced penalties for repeat offenders. In each of those circumstances, Congress defined a particular type of conduct that violates the CSA or Import Act and then provided that a person who commits such an offense after a conviction for a previous "felony drug offense" has become final is subject to an enhanced penalty for being a recidivist. In the CSA, commission of a previous "felony drug offense" results in a mandatory minimum sentence for some offenses and an increased statutory maximum sentence for others.[3]

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[3] See 21 U.S.C. 841(b)(1)(A) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment," and "any person [who] commits a violation of [specified provisions of the CSA] * * * after two or more prior convictions for a felony drug offense have become final * * * shall be sentenced to a mandatory term of life imprisonment without release"); 21 U.S.C. 841(b)(1)(B) (2000 & Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment"); 21 U.S.C. 841(b)(1)(C) (Supp. II 2002) ("any person [who] commits such a

The Import Act uses the term "felony drug offense" in essentially the same way.[4] The Import Act also contains a broad provision calling for increased punishment for any "second or subsequent offense," defined as "one or more prior [final] convictions * * * for a felony drug offense." 21 U.S.C. 962(b).

The structures of both the CSA and the Import Act confirm that Congress intended the definition of "felony drug offense" in 21 U.S.C. 802(44) to provide the exclusive meaning of that phrase throughout both statutes. Both the CSA and the Import Act begin with a "definitions" section and then continue with a series of sections defining substantive offenses and penalties. Rather than redefine the term "felony drug offense" each time it appears in the CSA and Import Act, Congress provided one definition of that term in Section 802(44) that applies to all references in both statutes. See 21 U.S.C. 802; 21 U.S.C. 951(b). And each of the times the term

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violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not more than 30 years"); 21 U.S.C. 841(b)(1)(D) (Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not more than 10 years").

[4] See 21 U.S.C. 960(b)(1) (2000 & Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment"); 21 U.S.C. 960(b)(2) (2000 & Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment"); 21 U.S.C. 960(b)(3) (Supp. II 2002) ("any person [who] commits such a violation after a prior conviction for a felony drug offense has become final * * * shall be sentenced to a term of imprisonment of not more than 30 years").

"felony drug offense" appears in a sentence enhancement provision in the CSA and Import Act, it is surrounded by the same words—*i.e.*, an enhanced penalty applies when the offense is committed "after a prior conviction for a felony drug offense has become final"—and serves essentially the same purpose—to provide for an increased punishment for a repeat drug offender. See pp. 22-23 & notes 3-4, *supra*. Congress's sensible choice to define the term "felony drug offense" and then use it for the limited purpose of sentence enhancement throughout the CSA and Import Act ensured that the term would have a consistent meaning in the federal laws that regulate controlled substances.

2. Petitioner's amici contend (Br. 23-24) that Section 802(13)'s requirement that an offense be classified as a felony must be incorporated into the definition of "felony drug offense" because each time the term "felony" appears in the CSA, it is in the context of a drug offense. The fact that the term "felony" is often used in reference to drug offenses is hardly surprising, because, after all, the statute at issue is the *Controlled Substances* Act. The important point is that Congress chose to use the (unadorned and defined) single term "felony" in provisions of the CSA other than the one at issue here, to serve a variety of different purposes.

The term "felony" is used to define substantive offenses,[5] to authorize certain punishments,[6] and to pro-

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[5] See 21 U.S.C. 843(b) (forbidding the use of a communication facility to accomplish the commission of a felony); 21 U.S.C. 848(c)(1) (defining a "continuing criminal enterprise" as involving certain felonies).

[6] See 21 U.S.C. 824(a)(2) (authorizing the Attorney General to revoke a registration to manufacture or distribute controlled substances based on a conviction of a felony); 21 U.S.C. 841(e) (providing circumstances in which a person may be enjoined for up to ten years from participat-

vide certain powers to law enforcement authorities.[7] In each of these instances, Section 802(13) indicates that a "felony" is defined by reference to its classification under the law of the relevant jurisdiction, not by the length of the authorized term of imprisonment. For example, in 21 U.S.C. 824(a)(2), Congress stated that the Attorney General may revoke a registration to manufacture, distribute, or dispense a controlled substance "upon a finding that the registrant * * * has been convicted of a felony under [the CSA or Import Act] or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical." In that context, Section 802(13) clarifies that "a felony under * * * any other law * * * of any State" relating to drugs means a state offense that is classified as a felony, rather than an offense that could be considered a felony based on the

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ing in further transactions involving controlled substances); 21 U.S.C. 843(d)(1) (Supp. II 2002) and 21 U.S.C. 843(d)(2) (2000 & Supp. II 2002) (authorizing increased maximum sentences for violations of that statute when offender has previously committed certain federal felonies); 21 U.S.C. 843(e) (providing circumstances in which a person may be enjoined for up to ten years from participating in further transactions involving controlled substances); 21 U.S.C. 848(e)(1)(B) (providing mandatory minimum sentence for person who causes the killing of a law enforcement official in order to avoid prosecution for a felony); 21 U.S.C. 853(d) (creating a rebuttable presumption in favor of forfeiture against any person convicted of a felony); 21 U.S.C. 862a(a) (denying eligibility for certain assistance and benefits programs for any person convicted of an offense classified as a felony).

[7] See 21 U.S.C. 878(a)(3) (granting drug enforcement officers the power to make warrantless arrests where there is probable cause to believe a felony has been committed).

length of imprisonment authorized.[8] Petitioner's amici argue (Br. 25) that Section 802(13) is "irrelevant" for the provisions of the CSA and Import Act that use the term "felony" in reference to certain *federal* offenses. But there, as well, the definition of "felony" dispels any ambiguity about what it means for an offense to be considered a "felony." See *Ali*, 128 S. Ct. at 840 (noting that Congress may use certain language "to remove any doubt" about the meaning of a term). Section 802(13) thus informs the use of "felony" in a variety of functions in the CSA and Import Act.

In contrast to the myriad usages of "felony" in the CSA and Import Act, Congress chose to use the more precise phrase "felony drug offense" solely to specify the type of prior conviction that will trigger a sentence enhancement for a repeat offender. See pp. 22-23, *supra*. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). That principle applies with even greater force in the context of a specifically-defined phrase. Here, "Congress's decision to use the precise term 'felony drug offense' in § 841(b)(1), instead of the more broadly used term 'felony,' evidences an intent to distinguish these sentence-enhancement provisions from the other provisions that refer to the generic 'felony.'" *Roberson*, 459 F.3d at 54.

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[8] Indeed, petitioner recognizes that Section 802(13) serves an important function under such circumstances, because it is the same function that he contends Section 802(13) served with respect to Section 841(b)(1)(A) prior to 1994. See Pet. Br. 9-11.

C. The Drafting History Confirms That Congress Intended Section 802(44) To Provide The Sole Definition For "Felony Drug Offense"

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236, which includes the CSA and the Import Act, in order to reorganize and consolidate existing federal drug laws and to enhance federal drug enforcement powers. See *Raich*, 545 U.S. at 11-13. Since that time, the CSA and Import Act have consistently included enhanced penalties for repeat offenders. The statutory evolution of the penalty-enhancement provision of Section 841 makes clear that Section 802(44) now provides the exclusive meaning for the term "felony drug offense" in that provision.

1. a. Initially, in 1970, Congress provided for an increased statutory maximum penalty for an offender who had previously violated certain *federal* drug laws in Section 841(b)(1)(A). See 21 U.S.C. 841(b)(1)(A) (1970) (enhanced maximum sentence if offender previously committed "an offense punishable under this paragraph, or for a felony under any other provision of this subchapter [the CSA] or subchapter II of this chapter [the Import Act] or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances"). Congress used that same formulation in other provisions of the CSA and the Import Act to increase the maximum statutory penalty for recidivists. See 21 U.S.C. 841(b)(1)(B) (1970); 21 U.S.C. 960(b)(2) (1970); 21 U.S.C. 962(b) (1970).

In 1984, Congress broadened the scope of triggering offenses for those penalty-enhancement provisions in the CSA and Import Act to include state and foreign offenses. See Comprehensive Crime Control Act of

1984, Pub L. No. 98-473, § 502(1)(B)(iii), 98 Stat. 2069. As a result, Section 841(b)(1)(A) provided for an enhanced penalty when an offender previously committed "an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances." 21 U.S.C. 841(b)(1)(A) (Supp. II 1984); see 21 U.S.C. 841(b)(1)(B) and (C) (Supp. II 1984) (same); 21 U.S.C. 962(b) (1982 & Supp. II 1984) (same).

In 1988, Congress introduced the term "felony drug offense" to describe the type of prior offense that would trigger an enhancement, and it expressly defined that term in Section 841:

> For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.

21 U.S.C. 841(b)(1)(A) (1988). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(1) and (2), 102 Stat. 4371. Congress then provided that a prior "felony drug offense" would result in a statutory minimum sentence, as opposed to an enhanced statutory maximum sentence. See *ibid.* Congress did not, however, utilize the term "felony drug offense" in other key sentence-enhancement provisions in the CSA and Import Act. See 21 U.S.C. 841(b)(1)(B), (C) and (D) (1988) (using

previous formulation of enhancement trigger); 21 U.S.C. 960(b)(1), (2) and (3) (1988) (same); 21 U.S.C. 962(b) (1988) (same).

Finally, in 1994, Congress changed the definition of "felony drug offense" and broadened its applicability. Congress amended the definition of "felony drug offense" to delete the word "felony" from the definition and replace it with the descriptive phrase "an offense that is punishable by imprisonment for more than one year" under a state, federal, or foreign law. 21 U.S.C. 802(43) (1994).[9] Congress also moved the definition of "felony drug offense" from Section 841(b)(1)(A) to Section 802, so that it would apply to all references to "felony drug offense" in the CSA and Import Act, see 21 U.S.C. 802(43) (1994), and it amended those provisions of Sections 841(b)(1), 960, and 962 that had retained the previous formulation of the sentence-enhancement trigger to use the term "felony drug offense." See 21 U.S.C. 841(b)(1)(B), (C) and (D) (1994); 21 U.S.C. 960(b)(1), (2) and (3) (1994); 21 U.S.C. 962(b) (1994).

b. The drafting history of Section 841(b)(1)(A) makes several points clear. First, because the definition of "felony drug offense" in 21 U.S.C. 802(44) originated in Section 841(b)(1)(A), and because it applies throughout the CSA and Import Act, see 21 U.S.C. 802 and 851, it is clear that Congress intended that the definition in Section 802(44) control the meaning of the phrase "felony drug offense" as it appears in Section 841(b)(1)(A).

Second, the 1994 amendments brought uniformity and clarity to the CSA and Import Act by providing a single, unambiguous definition of "felony drug offense"

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[9] Section 802(43) was renumbered Section 802(44) in 1996. See Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 401(b)(3), 110 Stat. 3107.

to be used throughout both statutes in the context of sentence-enhancement provisions.

Finally, the drafting history makes it pellucidly clear that Congress intended that whether an offense is serious enough to be considered a "felony drug offense" turns exclusively on the term of imprisonment imposed, not its classification by the punishing jurisdiction. Before 1994, Congress defined the triggering offense as one that is "a felony" under state, federal, or foreign drug law, 21 U.S.C. 841(b)(1)(A) (1988), which suggested, in conjunction with 21 U.S.C. 802(13) (1988), that an offense must be classified as a felony under state, federal, or foreign law. The 1994 amendments removed from the definition of a "felony drug offense" the word "felony," and replaced it with the explicit, punishment-based requirement that the offense be punishable by a term of imprisonment of more than one year. 21 U.S.C. 802(43) (1994). "When Congress acts to amend a statute," this Court "presume[s] it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U.S. 386, 397 (1995). Taken together, the changes in the 1994 Act remove any conceivable doubt that Congress intended the freestanding definition now codified in Section 802(44) to supply the exclusive source of the meaning of the defined phrase as used in the applicable penalty-enhancement provisions.

2. Petitioner contends (Br. 12-14, 16) that Congress's change in the statutory text in 1994 is insufficient to show that Congress intended the definition in Section 802(44) to define the term "felony drug offense" in Section 841(b)(1). Petitioner is mistaken, for it is beyond question that the best indication of Congress's intent is a change in the statutory text itself. See, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

Congress deleted the precise word that petitioner now seeks to add back into the statute, and Congress's change in the statutory text must be given effect. See, *e.g.*, *Carter* v. *United States*, 530 U.S. 255, 270-271 (2000). The resulting statutory text is clear, and petitioner cannot now create ambiguity simply by referencing the prior statute. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes.") (citation omitted).

Notably, petitioner has not identified any legislative history indicating that Congress had any intention to incorporate Section 802(13)'s classification requirement into the definition of "felony drug offense." Instead, he hypothesizes reasons why Congress might have wanted to define "felony drug offense" to require both that an offense be punishable by more than one year of imprisonment and be classified as a felony under the law of the punishing jurisdiction. Pet. Br. 17-23. But even where such reasons are not speculative, as they are here, "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language"; "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas* v. *United States*, 522 U.S. 52, 57 (1997) (internal quotation marks, citations, and brackets omitted).

Relatedly, petitioner suggests (Br. 14, 31, 34) that this Court should require an explicit statement of congressional intent in the legislative history before finding that Congress intended to change the substantive scope of a sentencing provision. This Court has repeatedly made clear, however, that "legislative history need not confirm the details of changes in the law effected by

statutory language before [it] will interpret the language according to its natural meaning." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) (citing cases); *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history.").

Petitioner notes (Br. 12-13, 16-17) that Congress labeled the 1994 amendments to Section 841(b)(1)(A) "conforming amendments," suggesting that that label means that Congress did not intend to modify the scope of the term "felony drug offense." That is incorrect. Congress called its 1994 amendments "conforming amendments" because they brought uniformity to the key sentence-enhancement provisions in the CSA and Import Act by ensuring that they were all triggered by the same type of offense—a "felony drug offense," as defined in Section 802(44). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105, 108 Stat. 1987-1988; see also H.R. Rep. No. 694, 103d Cong., 2d Sess. 419 (1994). The fact that the amendments served that purpose does not mean that they did not also have substantive effect. In addition to broadening the applicability of the term "felony drug offense" by applying it, for the first time, to Sections 841(b)(1)(B), (C) and (D); 960; and 962, Congress modified the definition of that term to achieve even greater uniformity by ensuring that the applicability of an enhanced penalty would not depend upon the happenstance of state classifications and labels, but would instead turn on an objective, consistent indication of seriousness—a maximum authorized punishment of more than one year.

Finally, petitioner suggests (Br. 15-16) that the 1994 amendments constituted an "implied partial repeal," and this Court should not presume such a result absent evidence of such an intention in the legislative record. But Congress *explicitly* altered the definition of "felony drug offense," and it did not repeal the definition of "felony" implicitly or otherwise. A repeal by implication "will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch* v. *Smith*, 538 U.S. 254, 273 (2003) (internal quotation marks omitted). Neither situation is present here: Sections 802(13) and 802(44) are not in "irreconcilable conflict"; they are just two different definitions of separate terms. Nor is Section 802(44) a wholesale substitute for Section 802(13), for the two definitions serve distinct purposes under the CSA, see pp. 24-26, *supra*. Section 802(13) may not be as widely applicable in the CSA after the 1994 amendments, but it certainly was not repealed. And to the extent that the addition of Section 802(44) limited the applicability of Section 802(13) with respect to sentence-enhancement provisions, Congress clearly indicated its intention to make such a change by deleting the language that could have been read to incorporate Section 802(13) and adding a new, explicit definition in Section 802(44).

D. Defining A "Felony Drug Offense" Solely By Reference To 21 U.S.C. 802(44) Furthers Congress's Reasonable Policy Objectives

"[T]he purposes underlying the [statute in issue] are most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it." *Dunn*

v. *CFTC*, 519 U.S. 465, 474 (1997). Using the definition in Section 802(44) to provide the meaning for "felony drug offense" in Section 841(b)(1)(A) furthers the important purpose of punishing and deterring repeat drug offenders, in a manner designed to ensure a measure of uniformity across state lines and international borders.

1. The CSA's enhanced penalties reflect a "congressional intent to significantly increase sentences for drug offenders with prior convictions for felony drug offenses" because "[r]epeat drug offenders are clearly more culpable than first time offenders, and the enhanced sentences required under [the CSA and Import Act] serve to incapacitate and punish those who have continued their involvement with drug trafficking despite prior prosecution." *United States* v. *Kole*, 164 F.3d 164, 175 (3d Cir. 1998), cert. denied, 526 U.S. 1079 (1999). The reasonable judgment that recidivists are deserving of increased punishment is consistent with Congress's general sentencing policy. See 28 U.S.C. 994(h) (directing the United States Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for serious recidivist offenders); *United States* v. *LaBonte*, 520 U.S. 751, 758 (1997) ("Congress has expressly provided enhanced maximum penalties for certain categories of repeat offenders in an effort to treat them more harshly than other offenders.").

Congress's decision to make the definition of "felony drug offense" independent of any given State's classification scheme for criminal offenses makes sense "in the context of the evolving nature of the CSA." *Roberson*, 459 F.3d at 54 n.10. As Congress "enact[ed] mandatory penalties," and then "increased the consequences of those mandatory penalties," it likely wanted "to ensure

that the mandatory recidivist penalty provisions would be applied uniformly not only across statutory lines, but also across state lines." *Ibid.* See 18 U.S.C. 3553(a)(6) (citing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); see also *Taylor*, 495 U.S. at 591 (noting Congress's "general approach of using uniform categorical definitions to identify predicate offenses"). This is especially true because some states and many foreign jurisdictions eschew the felony/misdemeanor distinction entirely. See N.J. Stat. Ann. § 2C:1-4 (West 2005); Me. Rev. Stat. Ann. tit. 17-A, § 1252 (Supp. 2007); p. 20, *supra*. By employing the specific phrase "felony drug offense," Congress "avoid[ed] the possibility that the substantial consequences of the mandatory sentence enhancements in § 841(b)(1)(A) would turn on the happenstance of a state's classification of a prior offense." *Roberson*, 459 F.3d at 54.

2. Petitioner contends (Br. 17-23) that Congress did not intend for offenses that are classified as misdemeanors under state law to be considered "felony drug offenses" because they are not sufficiently serious. As an initial matter, it cannot be assumed that an offense is not serious simply because a state chooses to classify it as a misdemeanor rather than a felony. Any number of serious offenses are classified as misdemeanors under certain States' laws but are punishable by more than one year of imprisonment. Those offenses include sex of-

fenses,[10] stalking,[11] assault and battery,[12] supplying a felon with a firearm,[13] identity theft,[14] and fraud.[15] Nor can it be assumed that possession of controlled substances is a minor offense, as petitioner contends (Br. 19 n.9). Although simple possession is a misdemeanor under federal law, many states punish it as a felony, see *Lopez*, 127 S. Ct. at 630 n.4, and the devastating consequences of drug use are well-established. See, *e.g.*, *Chandler* v. *Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting); *Harmelin* v. *Michigan*, 501 U.S. 957, 1002-1004 (1991) (Kennedy, J., concurring in part and concurring in the judgment). And petitioner's approach would eliminate recidivist enhancements based on prior convictions in States that do not classify *any* offenses as felonies. See p. 35, *supra*. But more to the point, the text of Section 802(44) reflects a judgment that the length of authorized punishment is a better measure of

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[10] *E.g.*, Colo. Rev. Stat. §§ 18-3-412(2), 18-1.3-501(1), (3) (2006) (sex offenses and abuse of children); Iowa Code Ann. § 901A.2 (West 2006); *id.* § 903B.2 (West Supp. 2007) ("sexually predatory" offenses).

[11] *E.g.*, La. Rev. Stat. Ann. §§ 14:40.2(B)(6)(a), 14:40.3(C)(2) and (3) (2007) (stalking and cyberstalking); Md. Code Ann., Crim. Law § 3-802 (West 2007) (stalking).

[12] *E.g.*, Conn. Gen. Stat. Ann. § 53a-40d(b) (West 2007) (persistent commission of crimes such as "assault, stalking, trespass, threatening and violation of a restraining order); Md. Code Ann., Crim. Law § 3-203 (West 2007) (assault); Mass. Ann. Laws, ch. 265, § 13A (LexisNexis 2002) (assault and battery); S.C. Code Ann. §§ 16-1-10(C), 16-3-610 (2003) (assault with concealed weapon).

[13] *E.g.*, La. Rev. Stat. Ann. § 14:95.1.1 (Supp. 2008) (illegally supplying a felon with a firearm).

[14] *E.g.*, Mass. Ann. Laws ch. 266, § 37E (LexisNexis 2002).

[15] *E.g.*, Md. Code Ann., Crim. Law § 8-401 (West 2007) (fraudulent conversion of partnership assets), *id.* § 8-516 (West 2007) (Medicaid fraud).

severity than a State's label for the offense. Rather than relying on States' divergent classification schemes to determine the severity of a prior drug offense, Congress reasonably chose to look to the authorized term of imprisonment. Cf. *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541 (1989) (in addressing the seriousness of an offense for jury-trial purposes, the most "relevant" objective criteria is "the severity of the maximum authorized penalty," which constitutes a legislative "judgment about the seriousness of the offense") (internal quotation marks omitted).

Petitioner relatedly contends (Br. 23) that the definition of felony drug offense in Section 802(44) "swe[pt] under the enhancement provision, for the first time, thousands of minor misdemeanor violations as the basis for" enhanced punishment. The 1994 amendments to the CSA likely did not have the widespread effect petitioner claims, because the vast majority of States define offenses punishable by more than one year of imprisonment as felonies, see Gov't Br. at 26 n.20, *Lopez* v. *Gonzales*, *supra* (No. 05-547) (citing state statutes), and because the 1994 amendments removed from the category of "felony drug offenses" state offenses classified as felonies but not subject to more than one year of imprisonment, see, *e.g.*, Ariz. Rev. Stat. Ann. §§ 13-701(5), 13-3402, 13-3415(A), (B) and (C) (2001); *id.* §§ 13-3405(B)(1), 13-3406(B)(2) (Supp. 2007). And to the extent that Congress did bring into the definition of "felony drug offense" misdemeanor offenses that would not have qualified under previous versions of the statute, Congress made that choice based on the commonsense notion that more serious offenses generally are

punished more severely, regardless of the descriptive label attached to the offense.[16]

In any event, petitioner's policy arguments are directed to the wrong authority, because it is well-established that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Brogan* v. *United States*, 522 U.S. 398, 408 (1998). Whether to include possession offenses within the ambit of "felony drug offenses" was Congress's choice to make, and Congress made it clearly in Section 802(44). Indeed, the courts of appeals have routinely rejected the argument that Congress did not intend for drug possession offenses to qualify as "felony drug offenses" as contrary to the clear statutory text.[17]

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[16] Petitioner also contends (Br. 23 n.13) that "the number of state misdemeanor offenses that would be considered felonies under Section 802(44) alone would increase substantially" if the government were to prevail in *United States* v. *Rodriquez*, No. 06-1646 (argued Jan. 15, 2008), because then any crime would be "'punishable by' more than a year's imprisonment if the maximum sentence under the provision exceeds a year for recidivist offenders." That is incorrect. The government's position is that recidivist offenders face the maximum sentence that applies to recidivists; first offenders face the maximum sentence that applies to first offenders. Nothing in that position would unjustifiably extend the class of felony offenses. Under that position, the only "misdemeanor" offenses that would be considered felonies are those that are in fact punished at the felony level by virtue of the defendant's recidivism. Cf. *Lopez*, 127 S. Ct. at 630 n.76 (describing recidivist drug possession, in violation of 21 U.S.C. 844(a), as a "felony violation[]," even though it is generally otherwise a misdemeanor).

[17] For example, in *United States* v. *Spikes*, 158 F.3d 913, 932 (1998), cert. denied, 525 U.S. 1086 (1999), the Sixth Circuit rejected the argument that, "in order for a prior drug conviction to count as a 'felony drug offense' * * *, the crime must involve possession of drugs plus some additional element, such as their manufacture or distribution," noting that "[n]othing in the statutory definition * * * remotely hints

If Congress wished to limit the type of offense to those that are (in petitioner's view) more serious, it easily could have provided an exclusion for simple possession offenses in the statutory text. In the ACCA, for example, Congress predicated the enhanced sentence for recidivist firearms offenders on whether they had committed a prior "serious drug offense," which is defined as a prior offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. 924(e)(2)(A)(ii). If Congress had intended to omit state possession offenses as petitioner claims, it could have done so in a manner similar to that employed in the ACCA. See *United States* v. *Hansley*, 54 F.3d 709, 718 (11th Cir. 1995) (rejecting defendant's argument that 21 U.S.C. 841(b)(1)(A) (1990) excludes drug possession offenses from the definition of "felony drug offense," in part because "if Congress meant to place a similar limitation [like that in 18 U.S.C. 924(e)] on section 841(b)(1)(A), it would have used the 'serious drug of-

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at the 'possession plus' gloss [the defendant] seeks to add to the statute." Similarly, in *United States* v. *Sandle*, 123 F.3d 809, 810-812 (1997), the Fifth Circuit rejected the argument that a possession offense without a specific intent element cannot qualify as a "felony drug offense," explaining that "[n]othing in the statutory definition of 'felony drug offense' suggests that the term is limited to those possession offenses involving an additional intent element." In *United States* v. *Richards*, 302 F.3d 58, 70-71 (2002), the Second Circuit found that the "plain language of [Section] 802(44)" refuted the argument that a state offense cannot be a "felony drug offense" when "a *federal* offense for the same conduct * * * would have been only a misdemeanor." And in *United States* v. *Rosales*, 2008 WL 375207, at *7-*8, the Ninth Circuit rejected the contention that the "legislative history and policy" of Section 841(b)(1)(A) suggest that a prior state conviction for simple possession cannot qualify as a felony drug offense.

fense' language and it would have provided a similar definition").

E. The Rule Of Lenity Has No Application To This Case

Finally, petitioner and his amici contend that petitioner's interpretation of Section 841(b)(1)(A) is compelled by the rule of lenity. Pet. Br. 26-34; NACDL/FAMM Br. 20-26. They are mistaken. The rule of lenity should have less, not more, force in the context of sentencing (as opposed to whether primary conduct is criminal at all), especially mandatory minimum sentences imposed on recidivists. In any event, the rule of lenity is inapplicable in his case because there is no "grievous ambiguity" about the meaning of "felony drug offense" in Section 841(b)(1)(A).

1. Petitioner and his amici contend that the rule of lenity applies "with special force" to statutes requiring mandatory minimum sentences. Pet. Br. 30-32; see NACDL/FAMM Br. 16-20. To the contrary, the rule of lenity should have *less* force when the relevant question is not whether a defendant's primary conduct is criminal, but whether the defendant is subject to a longer mandatory sentence for indisputably criminal conduct based solely on the legal classification of prior convictions. That is so because the fundamental purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct; that Congress, not the judiciary, defines criminal liability; and that selective or arbitrary enforcement be minimized. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988).

Those purposes have sharply reduced force as applied to mandatory minimum recidivist enhancements.[18]

a. Statutes requiring mandatory minimum sentences do not implicate the fundamental concern of the rule of lenity, which is the principle that a person should have fair notice of what conduct is prohibited. The rule of lenity is premised on the principle that criminal statutes should provide fair warning of what conduct is illegal. See *Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931). Application of the rule of lenity would not serve such a notice purpose in this case, because petitioner was not required to speculate with regard to whether his trafficking in more than five kilograms of cocaine per week was illegal. PSR ¶ 11; see *id.* ¶ 24 (petitioner's statement upon sentencing: "I know what I did and I know it was wrong.").

Sentencing statutes that require imposition of mandatory minimum sentences do not raise the same type of heightened notice concerns as statutes that prohibit primary conduct or that increase the maximum sentence available for an offense. This Court suggested as much in *Harris* v. *United States*, 536 U.S. 545 (2002), when it held that the Sixth Amendment permits a sentencing judge to find facts by a preponderance of the evidence that warrant the imposition of a mandatory minimum

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[18] This Court relied on the rule of lenity to adopt constructions of mandatory or mandatory minimum sentencing statutes that favored the defendants in *United States* v. *Granderson*, 511 U.S. 39 (1994), *Bifulco* v. *United States*, 447 U.S. 381 (1980), *Busic* v. *United States*, 446 U.S. 398 (1980), and Simpson v. *United States*, 435 U.S. 6 (1978). None of those cases, however, addressed the arguments made below concerning why the rule of lenity should apply with less force with respect to mandatory minimums.

sentence, so long as the sentence imposed is not beyond the authorized statutory maximum. That holding was based on the recognition that imposition of a mandatory minimum sentence does not raise the same types of constitutional concerns as a finding of guilt or an increase in the maximum punishment beyond that authorized by law. *Id.* at 558 (plurality opinion).

b. The second principle animating the rule of lenity—"[d]ue respect for the prerogatives of Congress in defining federal crimes," *Dowling* v. *United States*, 473 U.S. 207, 213 (1985)—also applies with less force to statutes requiring imposition of mandatory minimum sentences. The concern about Congress's power to define crimes is not implicated here, because there is no question about what conduct Congress prohibited or what maximum sentence it authorized to punish that conduct. Section 841(b)(1)(A), in setting a mandatory minimum sentence, simply specifies an appropriate point in a sentencing range, thereby limiting judicial discretion to impose a sentence below that point. Where the legislature has clearly defined the illegality of the underlying conduct and the maximum sentence for that conduct, courts need not put a thumb on the scales of statutory interpretation to avoid defining crimes or punishments that Congress did not intend. See *Harris*, 536 U.S. at 558 (plurality opinion).[19]

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[19] Contrary to petitioner's contention (Br. 32), mandatory minimum sentencing statutes do not alter the "traditional" balance of sentencing responsibilities between the legislative and judicial branches. Separation-of-powers concerns about legislative control over sentencing certainly have no historical pedigree in the founding era, when both English and American crimes were characterized by fixed penalties that left courts with little if any discretion in sentencing. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 479, 481 (2000). And this Court has more

c. The purpose of the rule of lenity to restrict arbitrary or selective enforcement is also inapplicable in this context. To the extent that Congress has mandated an increased minimum sentence based on recidivism, the determination whether to impose it turns on the legal significance of the defendant's prior criminal conduct. The government cannot act "arbitrarily" in that context because the court's legal determinations control the applicability of the enhancement. To the extent that the government has discretion whether to seek the enhancement at all (*i.e.*, by filing or withholding an information under 21 U.S.C. 851), nothing is improper about that; rather, "[s]uch discretion in an integral feature of the criminal justice system, and is appropriate, so long as it is not based upon improper factors." *LaBonte*, 520 U.S. at 762.

d. To the extent that history is relevant, the concerns behind the rule of lenity apply with even less force to statutes that require enhanced sentences for recidivist offenders, because the rule of lenity had no application to them at common law. As petitioner's amici acknowledge (Br. 6 n.6), the benefit of clergy was only available for first-time offenders at common law; recidivists were afforded no such lenity. See, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* *362-*364 (9th ed. 2001); see also Geoffrey Robertson,

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recently reaffirmed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman* v. *United States*, 500 U.S. 453, 467 (1991). By enacting a mandatory minimum, Congress "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given to that factor" within the authorized range. *Harris*, 536 U.S. at 568 (quoting *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89-90 (1986)).

The Tyrannicide Brief: The Story of the Man Who Sent Charles I to the Scaffold 73 (2005) (explaining that those who received the benefit of clergy were branded on the thumb to ensure that they could not receive that benefit again). That limitation on the rule of lenity makes sense, for it cannot be said that one who repeatedly commits (and is repeatedly convicted for) the same offense did not have fair warning of the illegality of his conduct. Thus, any force that the rule of lenity has with respect to mandatory minimum sentences is further lessened when applied to recidivists.

2. To the extent that the rule of lenity has any force in the context of recidivist sentencing enhancements, it is nonetheless inapplicable in the present case. The rule of lenity is applicable only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted).[20] A statute does not have a "grievous

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[20] Petitioner's amici suggest (Br. 15 n.17) that this Court should "clarify" that the trigger for the rule of lenity is a "reasonable doubt," not a "grievous ambiguity." No such clarification is required. This Court has long used the "grievous ambiguity" formulation to define the narrow circumstances in which the rule of lenity applies. See *Muscarello*, 524 U.S. at 138-139; *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994); *Chapman* v. *United States*, 500 U.S. 453, 463 (1991); *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974). And the "grievous ambiguity" standard is just a different way of expressing the long-settled rule that the rule of lenity only applies if, "after seizing everything from which aid can be derived," courts can make "no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (internal quotation marks omitted). As this Court has emphasized in the criminal context, "[t]he simple existence

ambiguity" simply because courts have disagreed as to its meaning. *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995). Moreover, "[a] statute can be unambiguous without addressing every interpretive theory offered by a party," *Salinas*, 522 U.S. at 60, and a mere "grammatical possibility" is likewise not enough to trigger the rule of lenity, *Caron* v. *United States*, 524 U.S. 308, 316 (1998).

There is no grievous ambiguity here. See 21 U.S.C. 802(44); *United States* v. *Nelson*, 484 F.3d 257, 263 (4th Cir. 2007). Courts "hardly need direction where Congress ha[s] thought to include an express, specialized definition for the purpose of a particular Act." *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). The only logical reading of Section 841(b)(1)(A) is that it incorporates only the definition of "felony drug offense" in Section 802(44), thereby covering all offenses "punishable by imprisonment for more than one year" under laws that prohibit "conduct relating to narcotic drugs, marihuana," and other controlled substances. Petitioner does not dispute that the plain language of Section 802(44) encompasses his prior cocaine possession conviction. In light of Section 802(44)'s specific definition of the exact term at issue in Section 841(b)(1)(A); the fact that the definition in Section 802(44) originated in Section 841(b)(1)(A) itself; and Congress's decision specifically to delete the requirement that petitioner

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of some statutory ambiguity * * * is not sufficient to warrant application of th[e] rule." *Muscarello*, 524 U.S. at 138-139.

Petitioner (Br. 14, 31, 34) and his amici (Br. 13-14) similarly contend that this Court should broaden the rule of lenity to require that Congress provide a "clear statement" of its intentions in sentencing statutes. This Court has never adopted such a rule, and to do so would raise serious separation-of-powers concerns by transforming courts into super-legislatures in the sentencing context.

seeks to engraft onto the statute, there is no ambiguity in the statute, let alone any "grievous" ambiguity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

1. 21 U.S.C. 802 (2000 & Supp. V 2005) provides, in pertinent part:

Definitions

As used in this subchapter:

* * * * *

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

* * * * *

(44) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

2. 21 U.S.C. 841 (2000 & Supp. V 2005) provides, in pertinent part:

(b) Penalties

Except as otherwise provided in section 849, 859, 60, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such

term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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IN THE

Supreme Court of the United States

KEITH LAVON BURGESS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government acknowledges that this Court, in several recent cases, has "relied on the rule of lenity to adopt constructions of mandatory or mandatory minimum sentencing statutes that favored the defendants." Gvt. Br. 41 n.18 (citing *United States v. Granderson*, 511 U.S. 39 (1994); *Bifulco v. United States*, 447 U.S. 381 (1980); *Busic v. United States*, 446 U.S. 398 (1980); and *Simpson v. United States*, 435 U.S. 6 (1978)). Indeed, it is an "ancient" and "venerable" principle of statutory construction that a penal statue applies only when it clearly and unambiguously requires imposing a certain punishment. *United States v. R. L. C.*, 503 U.S. 291, 305 (1992) (plurality opinion); *id.* at 310 (Scalia, J., concurring in part and concurring in the judgment). The government, however, urges this Court to abandon that line of sentencing jurisprudence and to relax the traditional conception of lenity in cases involving mandatory minimums. The government further urges that the statute at issue here, 21 U.S.C. § 841(b)(1)(A), applies to petitioner with unambiguous clarity.

Neither argument has merit. The rule of lenity properly dictates that mandatory-minimum provisions apply only when they clearly require the severe sentence at issue. If anything, the rule should apply with special force in the context of mandatory minimums. And the statute at issue here does not clearly and unambiguously apply to petitioner. It is not clear – in fact, it is simply not correct to say – that a state-law *misdemeanor* constitutes a "felony

drug offense" under Section 841(b)(1)(A) simply because it was punishable by more than one year.

I. The Rule of Lenity Dictates That Mandatory Minimum Provisions Apply Only When They Unambiguously Apply To A Defendant.

The government does not dispute that – as Professor Herbert Packer has summarized – courts have "traditionally" required a "clear statement" in penal statutes before applying them against individuals. Herbert L. Packer, The Limits of the Criminal Sanction 95 (1968). The government nonetheless insists (1) that a penal statute need not clearly apply to a defendant before it may be applied against him; and (2) that the rule of lenity "should have *less* force" than usual in the context of the mandatory minimum provision at issue here. Gvt. Br. 40-45. Neither argument withstands scrutiny.

1. The government argues that the rule of lenity applies "only when there is a grievous ambiguity in the statutory text" – a test the government construes as allowing it to punish an individual even when its interpretation of the statute at issue is not unambiguously correct. Gvt. Br. 44-45 (internal quotation marks omitted). The government's argument conflicts not only with the traditional conception of lenity (which is elaborated at Petr. Br. 27-29 and in the NACDL/FAMM amicus brief at 5-10), but also with decades of this Court's jurisprudence.

In one of this Court's first opinions elucidating the test for invoking the rule of lenity, Justice Holmes declared that "so far as possible" the line between punishable and non-punishable conduct "should be *clear*." *McBoyle v. United States*, 283 U.S.

25, 27 (1931) (emphasis added). Echoing Justice Holmes' prerequisite of clarity, Justice Frankfurter explained for this Court in a subsequent case that "if Congress does not fix the punishment for a federal offense *clearly and without ambiguity*, doubt will be resolved against [the government]." *Bell v. United States*, 349 U.S. 81, 84 (1955) (emphasis added). Numerous other cases have repeated this basic formulation and refused to apply – or refused to apply the harsher construction of – penal statutes in the absence of clear statements covering the conduct at issue. *See Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 409 (2003) ("only when Congress has spoken in clear and definite language"); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("clear and definite"); *Jones v. United States*, 529 U.S 848, 858 (2000) ("clear and definite"); *McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("only when Congress has spoken in clear and definite language"); *Dowling v. United States*, 473 U.S. 207, 214 (1985) ("clear and definite"); *United States v. Bass*, 404 U.S. 336, 347 (1971) ("clear and definite"); *Prince v. United States*, 352 U.S. 322, 329 (1957) ("clearly imports"); *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 222 (1952) (requiring "language that is clear and definite").

Although the government asserts that "[t]his Court has never adopted" a rule requiring that Congress "provide a 'clear statement' of its intentions in sentencing statutes," Gvt. Br. 45 n.20, this Court has repeatedly held that the "clear statement" rule applies to sentencing statutes, just as it applies to those regulating primary conduct. *See Granderson*, 511 U.S. at 54 (government's proffered interpretation must be "unambiguously correct"); *Bifulco v. United*

States, 447 U.S. at 400 & n.17 ("unambiguous legislative decision" is necessary); *Busic*, 446 U.S. at 406-07 ("a clear and definite legislative directive" is necessary); *Simpson*, 435 U.S. at 15-16 ("a clear and definite legislative directive"); *Bell*, 349 U.S. at 84 ("clearly and without ambiguity").

Instead of genuinely confronting this long-standing line of "clear statement" jurisprudence, the government fastens onto the phrase "grievous ambiguity" to suggest that the rule of lenity actually tolerates a certain degree of ambiguity in penal statutes. To be sure, this Court has used that phrase in a few cases. *See Muscarello v. United States,* 524 U.S. 125, 139 (1998) (quoting *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994)). The phrase derives from this Court's refusal in *Huddleston v. United States,* 415 U.S. 814 (1974), to apply the rule of lenity because – as this Court put it without reference to any prior precedents – it "perceive[d] no grievous ambiguity or uncertainty in the language and structure" of the statute in question. *Id.* at 831.

But nothing in *Huddleston* – or in any of the handful of other cases that since have quoted its "grievous ambiguity" passage – purported to adopt a new standard or to change the centuries-old test for invoking the rule of lenity. *Huddleston* itself acknowledged that "penal laws are to be construed strictly." *Id.* In the portion of the opinion reciting the test for triggering the rule of lenity, the Court cited *Bass* and other cases that require a "clear and definite" statement. *Bass,* 404 U.S. at 347; *see Huddleston,* 415 U.S. at 831 (citing *Bass*). Furthermore, *Huddleston* and the cases the government now cites declined to apply the rule of

lenity only after noting that "[t]he statute in question clearly proscribe[d] petitioner's conduct," *Huddleston,* 415 U.S. at 831, or that the statute was otherwise clearly unambiguous. *See also Muscarello,* 524 U.S. at 139 (conduct at issue fell within the "generally accepted contemporary meaning" of the statutory language); *Staples,* 511 U.S. at 619 n.17 ("Certainly, we have not concluded in the past that statutes silent with respect to *mens rea* are ambiguous."); *Chapman v. United States*, 500 U.S. 453, 459 (1991) (statutory interpretation offered by criminal defendant was "not a plausible one").

Accordingly, *Huddleston*'s "grievous ambiguity" passage is best understood as requiring merely that any doubt concerning the correctness of the government's proffered interpretation be a "*reasonable* doubt." *R. L. C.*, 503 U.S. at 305 (plurality opinion) (emphasis added; internal quotation marks omitted). The rule of lenity does not apply whenever a defendant can advance some "grammatical possibility" that a penal statute, when read in a vacuum, does not apply to him. *Caron v. United States,* 524 U.S. 308, 316 (1998); *cf. Victor v. Nebraska*, 511 U.S. 1, 20 (1994) (a reasonable doubt is not mere "fanciful conjecture," but rather "doubt that would cause a reasonable person to hesitate"). On the other hand, when language in a criminal law leaves this Court with "a reasonable doubt . . . about [the] statute's intended scope," then lenity requires this Court to adopt the statutory interpretation that absolves the defendant of the penalty at issue. *R. L. C.*, 503 U.S. at 305 (plurality opinion) (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)); *see also Bifulco,* 447 U.S. at 400 ("[T]o the extent that doubts remain, they must be resolved in accord with the rule of

lenity."). A reasonable doubt over whether the statute requires a defendant to spend years behind bars gives rise, by definition, to a grievous ambiguity.

2. The government does not offer any legitimate reason to relax the rule of lenity in the context of mandatory-minimum sentences. The government points out that mandatory-minimum statutes do not define "criminal" conduct in the sense of marking the borderline between innocent and prohibited conduct. Br. 41-42. But this Court has observed that "when viewed in terms of the potential difference in restrictions of personal liberty," distinctions between different kinds of criminal conduct "may be of greater importance than the difference between guilt or innocence for many [minor] crimes." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). It is elementary, therefore, that individuals deserve fair notice of factual circumstances or conduct that will *require* them to serve lengthy prison sentences instead of likely serving much shorter ones.

The government's additional suggestions (Br. 43-44) that lenity is less necessary in the context of mandatory punishments based on recidivism are exactly backwards. Plain statement rules are designed in part to require "unmistakably clear" evidence that Congress intended to upset a usual balance of constitutional powers. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). And the separation-of-powers concerns that animate the rule of lenity apply with particular force when the issue is whether a certain sentence is categorically required. Courts "tradition[ally]" exercise great discretion in sentencing defendants. *Gall v. United States*, 128 S. Ct. 586, 598 (2007) (quoting *Koon v.*

United States, 518 U.S. 81, 113 (1996)). While Congress has the power to eliminate that discretion, courts should not assume it has exercised that power absent a clear indication – especially when, as here, courts retain both the duty to consider defendants' criminal histories and the ability to impose sentences as long as (or longer than) the mandatory minimum. *See* NACDL/FAMM Br. 18-19.

Furthermore, the rule of lenity, like other principles of statutory construction, is designed to preserve the role of the democratic process in determining the ultimate meaning of our laws. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162 (2002); *see also Granderson*, 511 U.S. at 60 (Scalia, J., concurring in the judgment) ("It is best" when faced with ambiguous criminal statutes "to let Congress make the needed repairs."). When this Court adopts the more lenient reading of an unclear mandatory-minimum statute, it does so secure in the knowledge that Congress is ready, willing, and able to amend the statute if it prefers a harsher interpretation. Statutory interpretations of penal statutes favoring criminal defendants, in fact, are "more likely to be legislatively overturned than any other type of statutory interpretation." Elhauge, *supra*, at 2194; *cf. Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (noting that "anticrime legislation is far more popular than legislation providing protections for" criminal defendants).[1]

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[1] For one example, see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473 (1984), § 1005, 98 Stat. 1976, 2138-39, *superseding Busic v. United States*, 446 U.S. 398 (1980), and *Simpson v. United States*, 435 U.S. 6 (1978).

By contrast, if this Court interprets a criminal statute more harshly than Congress intended, the "overly broad interpretation . . . would likely stick" because repeat criminal offenders have little, if any, political influence. Elhauge, *supra*, at 2194. In many states, they cannot even vote. At the very least, therefore, "[t]he requirement of clear statement assures the legislature in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" at issue. *Bass*, 404 U.S. at 349.

II. The Mandatory-Minimum Requirement In Section 841(b)(1)(A) Does Not Clearly And Unambiguously Apply to Petitioner.

The government argues that Congress has plainly ordained that state-law *misdemeanors* punishable by more than one year constitute "felony drug offenses" under Section 841(b)(1)(A). In support of this argument, the government contends that the statute's "plain text," its context, its drafting history, and Congress's "reasonable policy objectives" all dictate this result. At the end of the day, however, the government's arguments demonstrate nothing more than that it has a reasonable counter-argument to petitioner's proposed reading of the statute – or, as Professor Karl Llewellyn famously observed, that for every canon of statutory construction, there is an equally valid counter-canon. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401 (1950); *see also Bell*, 349 U.S. at 83 (acknowledging that "argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions"). That demonstration –

strenuous and sustained as the government's thirty-page statutory argument may be – cannot overcome the rule of lenity.

A. It Is Textually Reasonable To Read "Felony Drug Offense" As Requiring That The Offense At Issue Be Classified As A Felony.

The government first argues that the CSA's plain text dictates that Section 802(44)'s one-year rule supplies "the exclusive meaning" of the phrase "felony drug offense" in Section 841(b)(1)(A). Br. 12. But each of the interpretive canons the government summons in service of this argument shows only that Congress drafted an unclear statute.

1. The government first invokes the canon that "[s]tatutory definitions control the meaning of statutory words," Br. 11 (citation and internal quotation marks omitted), and argues that because Section 802(44)'s definition of "felony drug offense" is "explicit" and "precise," courts "must follow that definition, even if it varies from that term's ordinary meaning." *Id.* at 11-12 (citation and internal quotation marks omitted). But this argument does not answer petitioner's claim that the definition of "felony" in Section 802(13) – requiring that an offense be classified as a felony in order to be a felony – *also* supplies meaning to the phrase "felony drug offense" in Section 841(b)(1)(A). Section 802(13) defines the term "felony" no less explicitly or precisely than Section 802(44) defines the term "felony drug offense." And the word "felony" appears in Section

841(b)(1)(A) just as surely as the phrase "felony drug offense" does.[2]

This Court has held that even when a statutory definition appears to define a term differently from its "everyday" usage, lenity requires the term to be construed in accordance with its everyday usage when that leads to a plausible and narrower result. *See McBoyle*, 283 U.S. at 26-27 (invoking lenity to construe "vehicle" so as not to apply to defendant who transported a stolen airplane). That principle, at the very least, controls here. The average citizen would not describe *misdemeanor* drug possession as a "felony drug offense." Because nothing in the CSA expressly renders that everyday understanding irrelevant to the meaning of the phrase "felony drug offense," the Court must resolve that lack of specification in favor of lenity.[3]

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[2] The government similarly maintains that only one subsection of the statute can define the phrase "felony drug offense" because the phrase is a "term of art." Br. 7, 11, 14, 15. But the government never explains why a term of art cannot derive its meaning from multiple relevant definitional sections.

[3] Citing cases and *Black's Law Dictionary*, the government insists that the "general definition of felony in federal criminal law" is a crime punishable by more than one year. Br. 13. But that general definition merely describes the reality that crimes that are classified as felonies typically are punishable by more than one year. In any event, the government's citation to nonstatutory sources contradicts its earlier argument that "[w]hen a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." Br. 11-12 (internal quotation marks and citation omitted). Section 802(13) explicitly defines "felony" as an offense classified as a felony.

2. Invoking the canon that "this Court ordinarily resist[s] reading words or elements into a statute that do not appear on its face," Br. 15 (internal quotation marks and citation omitted), the government next argues that Section 802(44)'s one-year rule must be the exclusive definition for "felony drug offense" in Section 841(b)(1)(A) because that definition gives meaning to each of the words in the phrase "felony drug offense." Br. 13. The government misses the mark here as well. The issue here is not whether this Court should read the word "felony" into Section 802(44). Instead, the issue is whether this Court should read the definition of "felony" into the phrase "felony drug offense" in Section 841(b)(1)(A). No insertion of new language is necessary to do that; the term "felony" already appears on the face of Section 841(b)(1)(A).

The government's argument also disregards common legislative practice. Contrary to the government's suggestion that Congress never separately defines terms within larger phrases that also are defined, Congress regularly separately defines statutory terms that are nested within larger defined phrases. Br. 17-18. And in such cases, as here, one must consult *both* provisions to comprehend the full meaning of the phrase at issue. For example, 2 U.S.C. § 1301 defines the term "employee" as "includ[ing] an applicant for employment and a former employee." The statute's definitional section then proceeds to define a series of more par-ticularized uses of that term, such as "employee of the Capitol Police" and "employee of the House of Represent-

atives." *Id.* §§ 1301(6)-(7).[4] Although none of those definitions uses the term "employee," it is sensible – even though those definitions refer in other ways to classes of individuals covered and thus could be viewed in isolation as comprehensive – to treat them as incorporating the definition of "employee."

Other statutes utilize the same approach. 18 U.S.C. § 2266 defines the term "[e]nter or leave Indian country" to "include[] leaving the jurisdiction of 1 tribal government and entering the jurisdiction of another tribal government." *Id.* § 2266(3). Though this definition appears complete in itself, it is not: The statute also defines the more basic term "Indian country" ("The term 'Indian country' has the meaning stated in section 1151 of this title."), providing a second definition that fills out the meaning of the particularized term "[e]nter or leave Indian country." *See id.* §§ 2266(4), 1151. Similarly, 11 U.S.C. § 101(13) defines the term "debtor" as a "person or municipality concerning which a case under this title has been commenced" and then defines "debtor's principal residence" as "a residential structure, including incidental property, without regard to whether that structure is attached to real property." The former obviously complements the latter.

3. Nor does the government advance its cause by invoking the canon that when Congress wants to accomplish a certain result, it knows how to do it

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[4] Section 1301(6) provides: "The term 'employee of the Capitol Police' includes any member or officer of the Capitol Police." Section 1301(7) provides: "The term 'employee of the House of Representatives' includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives . . . ."

expressly. It may be true, as the government suggests, that Congress could have explicitly stated its desire that the classification requirement in Section 802(13) apply to the phrase "felony drug offense" in Section 841(b)(1)(A). Br. 16-18. But the converse is also true. If Congress had wanted to render an offense's classification *irrelevant* to whether it triggered Section 841(b)(1)(A), it could have said that explicitly as well. For instance, the "career offender" provision of the United States Sentencing Guidelines provides that a defendant is a career offender if, *inter alia*, he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). An Application Note in that section provides: "'Prior felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, *regardless of whether such offense is specifically designated as a felony* and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2 n.1. Congress's failure to use such language in Section 802(44) indicates that the classification requirement in Section 802(13) remains relevant to Section 841(b)(1)(A).

B. Statutory Context Supports Requiring An Offense To Be Classified As A Felony In Order To Constitute A "Felony Drug Offense."

The government next makes an argument based on "statutory context." It contends that Section 841(b)(1)(A)'s phrase "felony drug offense" cannot incorporate the felony-classification requirement in Section 802(13) because "Congress used the [phrase]

throughout the penalty provisions of the CSA and Import Act to provide for enhanced penalties for repeat offenders," Br. 22, whereas Congress "use[d] the (unadorned and defined) single term 'felony'" for "different purposes" – namely, "to define substantive offenses, to authorize certain punishments, and to provide certain powers to law enforcement authorities." Br. 24-25 (footnotes omitted). The government also makes the contextual argument that applying Section 802(13)'s classification requirement to those penalty provisions "would create significant uncertainty about the status of foreign offenses." Br. 20. Neither of these arguments adds any clarity to the statutory question here.

1. The government's suggestion that the unadorned term "felony" can only "define substantive offenses," "authorize certain punishments," and "provide certain powers to law enforcement authorities" manufactures a limitation that Congress did not itself impose. Nothing in the CSA says that those are the exclusive uses of the term "felony." To the contrary, Congress provided that the definition of "felony" in subsection (13) governs the word "[a]s used in this subchapter" without limitation. 21 U.S.C. § 802.

If anything, the statutory context of the CSA indicates that the term "felony," when used in conjunction with "drug offense," is meant to ensure that prior convictions triggering the imposition of severe mandatory-minimum sentences are actually classified as felonies. All of the penalty provisions in Section 841(b) aim to punish not just any drug-crime recidivism, but *serious* drug-crime recidivism. The substantive provisions thus speak explicitly to prior

"felony" drug offenses, rather than to just *any* prior offenses that are punishable by more than one year of imprisonment. *See* 21 U.S.C. §§ 841(b)(1)(A)-(D), 960(b)(1)-(3), 962(b). In that respect, it makes perfect sense to combine the felony-classification requirement in Section 802(13) with the "punishable by one year" requirement in Section 802(44) to identify those prior convictions that are sufficiently serious to trigger the categorical twenty-year minimum in Section 841(b)(1)(A).

The government's attempt to ignore the definition of "felony" in Section 802(13) also is difficult to square with this Court's decision in *United States v. Granderson*, 511 U.S. 39 (1994). In that case, the government advocated different constructions of the word "sentence" in the statutory phrases "sentence the defendant" and "original sentence" – arguing that "sentence" meant "sentence to imprisonment" in the former, but "sentence of probation" in the latter. *Id.* at 46. Because the government's position was not "unambiguously correct," *id.* at 54, this Court applied the rule of lenity in favor of the "construction [that] keeps constant the meaning of 'sentence'" in both phrases. *Id.* at 47. There is just as strong a justification to keep the meaning of "felony" – at least insofar as a prior offense must be classified as such – constant across all of the term's uses in the CSA. Retaining that classification requirement also would maintain consistency with other provisions of the U.S. Code requiring offenses to be classified as felonies in order to be treated as such.[5]

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[5] *See, e.g.*, 7 U.S.C. § 2015(k)(1) (individual is ineligible for food stamps if fleeing from prosecution or confinement for a crime "that is a felony under the law of the place from which the

2. Nor is the government correct that applying the felony-classification rule in Section 802(13) to Section 841(b)(1)(A) "would create significant uncertainty" concerning prior foreign convictions. Br. 20.

Because Section 802(13) does not mention foreign offenses and some foreign countries "do not distinguish between felonies and misdemeanors in their criminal laws," the government suggests that applying Section 802(13)'s classification requirement to Section 841(b)(1)(A) might mean that drug convictions from foreign countries – or at least those from countries that do not classify their crimes as felonies or non-felonies – could never trigger the mandatory minimum in Section 841(b)(1)(A). Gvt. Br. 20-21. Yet Section 841(b)(1)(A) has applied since 1984 to individuals with convictions for foreign "felony" drug offenses. *See* Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, § 502(1)(B)(iii), 98 Stat. 1837, 2068. The one-year rule in Section 802(44) was not enacted until 1994.[6] And from 1984 to 1994, courts enforced Section 841(b)(1) with respect to prior serious drug offenses from foreign countries. *See, e.g., United States v. Moskovits*, 815 F. Supp. 147 (E.D. Pa. 1993) (applying enhancement based on prior conviction for Mexican drug offense). Courts also enforced Section 841(b)(1) with respect to prior serious drug offenses from jurisdictions that did not classify crimes as

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individual is fleeing"); 38 U.S.C. § 5313B(b)(1)(A) (same regarding veteran's benefits); 5 U.S.C. § 8148(b)(1) (ineligibility for worker's compensation if convicted "of an offense that constituted a felony under applicable law").

[6] As the government points out (Br. 29 n.9), the current Section 802(44) was initially codified in 1994 as Section 802(43).

felonies. Courts did so by analogizing such prior convictions to convictions from jurisdictions that do distinguish between felonies and non-felonies. *See, e.g.. United States v. Brown*, 937 F.2d 68 (2d Cir. 1991) (affirming enhancement based on prior conviction for drug possession under New Jersey regime that uses the term "high misdemeanor" rather than "felony").

Nothing about the changes in 1994 that added Section 802(44)'s one-year rule altered the legitimacy of that method of reasoning-by-analogy. Indeed, federal courts applying various types of statutes have become well accustomed to determining when offenses from jurisdictions that do not distinguish between felonies and misdemeanors should be treated as if they were classified as felonies. *See, e.g.*, *Hansen v. U.S. Parole Comm'n*, 904 F.2d 306 (5th Cir. 1990) (determining release date for citizen serving sentence for a foreign conviction by analogizing to similar federal sentencing law); 24 C.J.S. Crim. Law § 2310 (2006) (describing the comparisons courts use to assess the nature of foreign offenses). There is no reason why courts cannot continue to use this comparative method when necessary under the statutory scheme at issue here.

C. The Relevant Drafting History Provides No Clear Guidance Regarding What Constitutes A "Felony Drug Offense."

Even though Congress referred to the 1994 amendments to Section 841(b)(1)(A) as "Conforming Amendments," *see* Petr. Br. 4, the government asserts that the CSA's drafting history shows that Congress intended to expand significantly the reach of the twenty-year mandatory minimum in Section

841(b)(1)(A) to cover state-law misdemeanors punishable by more than one year. The government bases this assertion on the premise that Congress in 1994 "removed" or "deleted" the word "felony" from the definition of the phrase "felony drug offense." Gvt. Br. 29-31.

But this premise is incorrect. The definition of "felony drug offense" in Section 802(44) that Congress enacted in 1994 was brand new. Nothing could have been "removed" or "deleted" from it. What is more, when Congress enacted that definition in 1994, it *left in place* the pre-existing requirement in Section 802(13) that an offense be classified as a felony in order to constitute a "felony."

Stripped of its misleading locution, the government's position is merely that because Congress modified the CSA in 1994 to require that a "felony drug offense" be punishable by more than one year of imprisonment, it necessarily must also have meant to eliminate the requirement in Section 802(13) that such an offense had to be classified as a felony. But the broader drafting history of the CSA actually indicates that Congress did *not* intend to abrogate Section 802(13)'s felony-classification requirement. When Congress expanded Section 841(b)(1) in 1984 to cover state and foreign felonies, it explicitly stated its intention to do so in the legislative history. *See* S. Rep. No. 98-225, 258-59 (1984), *reprinted at* 1984 U.S.C.C.A.N. 3182, 3440-41. The government does not explain why, in 1994, Congress would have suddenly abandoned the definition of "felony" that had applied to Section 841(b)(1) for nearly twenty-five years, without so much as a whisper.

At the very least, Congress's failure clearly to signal any desire to repeal the statute's previously controlling definition of felony supports invoking the rule of lenity. This Court repeatedly has applied the rule of lenity to ambiguous statutes when a provision appears from its drafting history "not to have received Congress' careful attention." *See Granderson*, 511 U.S. at 42; *accord Bass*, 404 U.S. at 343-44. In *Granderson*, the provision at issue was a small portion of "a large and complex measure" that was "more like a telephone book than a piece of legislation" and was not discussed during the legislative process. 511 U.S. at 51 (internal quotation marks omitted). In *Bass*, the provision at issue was an amendment in omnibus legislation that received "little discussion, no hearings, and no report." 404 U.S. at 344. Likewise here, the Conforming Amendments to the "felony drug offense" provisions of the CSA amounted to barely one half of one page out of the 356 pages that comprised the Violent Crime Control and Law Enforcement Act of 1994. *See* 108 Stat. 1796, 1987-88. The amendments are not discussed anywhere in the legislative record.

In light of this indeterminate history, the government cannot credibly contend that Congress clearly intended in 1994 to repeal the requirement that an offense be classified as a felony in order to constitute a "felony drug offense" in Section 841(b)(1)(A). As this Court has noted, one "cannot pretend that all statutes are model statutes. While courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking." *Bass*, 404 U.S. at 344.

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell*, 349 U.S. at 83.

D. Requiring An Offense To Be Classified As A Felony In Order To Constitute A "Felony Drug Offense" Advances Policy Objectives That Are At Least As Reasonable As Those The Government Advances.

The government contends that treating state-law misdemeanors punishable by more than one year as "felony drug offenses" furthers the "reasonable policy objectives" of imposing harsh punishment upon recidivists and ensuring that such punishment is applied "uniformly . . . across state lines." Gvt. Br. 33-35 (internal quotation marks and citation omitted). As an initial matter, however, this Court has long held that no policy objective can justify punishing a criminal defendant on the basis of a textually unclear statute, no matter how "much reason for supposing" that Congress would have desired such punishment. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820). As Chief Justice Marshall explained, the probable intent of Congress "is not a guide which a court, in construing a penal statute, can safely take." *Id.* at 105; *see also Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against [a defendant] on the basis of general declarations of policy.").

In any event, the first of the government's proffered objectives – punishing repeat drug

offenders severely – is, as in a previous lenity case, "easily answered." *Granderson*, 511 U.S. at 49. In *Granderson*, the government argued that a broad reading of a mandatory-minimum law was necessary to further a policy of "get[ting] tough on drug offenders." *Id.* This Court rejected that argument, reasoning that such a generalized policy did not provide "any reliable guidance" for interpreting "particular provisions" of the statute. *Id.* The same is true here. Section 841(b)(1)(A) will mandate severe punishment for numerous repeat drug offenders regardless of whether it is construed to cover defendants who have prior misdemeanor convictions. Consequently, there is no need to construe the statue broadly to achieve the government's proffered objective.

The government's second objective – uniformity – can be furthered *more* effectively under petitioner's position than under the government's. Requiring that prior offenses have been punishable by a certain amount of time *and* that they be classified as felonies produces more uniformity than requiring only the latter. Indeed, the government admits that the 1994 Conforming Amendments removed from the category of "felony drug offenses" those offenses classified as felonies but not subject to more than one year of imprisonment. Br. 37. This reflects Congress's apparent desire to ensure that mandatory-minimum sentences be reserved for individuals who had previously committed truly serious drug crimes.

What the government really must mean to argue is that its construction of Section 841(b)(1)(A) *adequately* serves the objective of uniformity because

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No. 06-11429

IN THE

Supreme Court of the United States

KEITH LAVON BURGESS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs on a broad range of issues in this Court and other courts and has filed *amicus curiae* briefs in previous cases involving the interpretation of mandatory minimum sentencing statutes. *See, e.g., Begay v. United States*, No. 06-11543 (argued Jan. 15, 2008).

Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization of 14,300 members founded in 1991. FAMM's primary mission is to promote fair and proportionate sentenc-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

ing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

Amici file this brief for two reasons. First, the question presented in this case will affect the sentences of a significant number of criminal defendants in the federal courts. This Court's decision will have a direct and immediate impact on the lives of these individuals and their families. Second, the way in which the Court decides this case will greatly influence how the federal courts deal with the widespread proliferation of mandatory minimum sentencing provisions. *Amici* believe that the Court should take the opportunity offered by this case to emphasize the important role of the rule of lenity in interpreting those provisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both the historical roots of the rule of lenity and its modern function in American criminal law strongly suggest that a "felony drug offense" for purposes of 21 U.S.C. § 841(b)(1)(A) must be a "felony" within the meaning of 21 U.S.C. § 802(44). The Court should reaffirm the importance of the rule of lenity and emphasize the rule's especially significant role in the interpretation of mandatory minimum sentences.

The rule of lenity derives from the practice of the English courts in the seventeenth and eighteenth centuries of strictly construing penal statutes. The

English courts applied this rule of strict construction primarily to enactments that effectively imposed a mandatory death sentence for a broad range of felonies by removing the so-called "benefit of clergy," a legal fiction that had allowed first-time offenders to avoid hanging. Parliament passed many such statutes, some of which applied to minor felonies, such as shoplifting. The courts responded by reading these statutes narrowly, thereby reducing the number of covered felonies. The result was a rule requiring a clear statement by Parliament before the courts would construe a statute as depriving a defendant of the benefit of clergy and subjecting him to the death penalty. Some of these historical precedents, moreover, show an emerging understanding that a restrained judicial reading of sentencing laws appropriately observes the line between the legislature's prerogative in enacting criminal statutes and the more limited judicial role of interpreting and applying them.

The rule of lenity likewise has deep roots in American law. Chief Justice Marshall's opinion in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820), detached the rule from any particular association with capital sentencing and located it firmly in the understanding that it is the role of the legislature, not the courts, to define crimes and their punishments. By the time of *McBoyle v. United States*, 283 U.S. 25 (1931), it was clear that the rule of lenity was a structural safeguard requiring that criminal punishment be clearly authorized by a statute — not so much for the benefit of the individual defendant, who Justice Holmes's opinion acknowledged was unlikely to "carefully consider the text of the law," *id.* at 27, but rather to protect the broader principle

it "reflects a judgment that the length of authorized punishment is a better measure of severity than a State's label for the offense." Br. 36-37. But as petitioner already has shown, the length of permissible sentences – especially in the context of drug crime – varies widely from state to state, and thus is often a poor guide for judging the seriousness of the underlying conduct. Petr. Br. 21-22. Classifying a crime as a felony, by contrast, has a time-honored import and carries well-established consequences. Individuals who are convicted of "felonies" can lose the right to vote, *see Richardson v. Ramirez*, 418 U.S. 24 (1974); the right to run for public office, *see, e.g.*, Tex. Elec. Code § 141.001(a)(4) (Vernon 2007); the right to obtain professional licenses, *see, e.g.*, N.Y. Real Prop. Law § 440-a (McKinney 2006) (real estate license); and numerous other civil rights. It thus seems likely that Congress – even while adding a length-of-punishment criterion to the calculus for determining whether a prior conviction for a drug offense triggers a twenty-year mandatory sentence – would have wanted to retain the requirement that such prior offenses also be classified as felonies.

Even assuming, as the government says, requiring a crime to be classified as a felony in order to constitute a "felony drug offense" does not have any practical significance in the vast majority of cases, this reality would not pose any impediment to enforcing Section 802(13)'s classification requirement in cases in which it does matter. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the

same limitation." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). In cases where the rule of lenity comes into play, "[t]he lowest common denominator, as it were, must govern." *Id.*

CONCLUSION

For the foregoing reasons, as well as those in the petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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that prospective statutes, not retrospective judicial decisions, should define the criminal law. The rule of lenity is by now an established part of our legal system and a background principle against which Congress presumptively legislates, and so has acquired precedential significance that reinforces its original justification.

Application of the rule of lenity is particularly appropriate with respect to mandatory minimum sentencing provisions, such as § 841(b)(1)(A). Like the English statutes removing benefit of clergy, mandatory minimums require a harsher punishment than might otherwise be imposed after judicial consideration of the circumstances of a particular case. Mandatory minimums are thus contrary to the usual rule permitting discretion in sentencing. Applying the rule of lenity to mandatory minimums also vindicates the underlying bases of the rule — the separation of powers and the principle of legality. A mandatory minimum sentence, with its serious consequences for individual liberty, should be imposed only when Congress has spoken clearly. In addition, the certainty offered by the rule of lenity enhances the smooth operation of the criminal justice system.

Petitioner correctly argues that § 841(b)(1)(A) is best read in his favor even without the rule of lenity. But that rule resolves any residual doubt in petitioner's favor. The contrary position of the First and Fourth Circuits and the Government ignores the plain language and ordinary meaning of the statute in favor of dubious extensions of inapplicable canons of statutory construction. This Court should reject those arguments and construe § 841(b)(1)(A)

narrowly, consistent with the longstanding and well-justified rule of lenity.

ARGUMENT

I. THE HISTORY AND PURPOSES OF THE RULE OF LENITY SUPPORT ITS APPLICATION TO MANDATORY MINIMUM SENTENCES

A. The Rule of Lenity Is Rooted in the Narrow Construction of Mandatory Sentences

At common law, all felonies were punishable by death. *See, e.g., Standefer v. United States*, 447 U.S. 10, 15 (1980). Over time, however, the English courts developed procedural mechanisms that left room for discretion to impose what were effectively noncapital sentences. *See id.* Among these was the doctrine known as "benefit of clergy."[2] Benefit of clergy was originally a jurisdictional mechanism by which ordained clergy could transfer criminal cases brought against them out of the royal courts and into the ecclesiastical courts.[3] Later, benefit of clergy became available to almost any male defendant who could read;[4] and, later still, to almost any defendant

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[2] *See generally* 4 William Blackstone, *Commentaries* *365-74 ("Blackstone"); 1 James Stephen, *A History of the Criminal Law of England* 458-73 (1883); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 37-41 (1983).

[3] *See* Langbein, 50 U. Chi. L. Rev. at 37; Jerome Hall, *Theft, Law and Society* 110-11 (2d ed. 1952) ("Hall"). According to Blackstone's somewhat critical summary, the ecclesiastical courts would reexamine the merits of the conviction under procedures markedly more favorable to the accused, and it was common for them to find innocent those previously found guilty. *See* 4 Blackstone at *361; *see also* Hall at 110 n.1.

[4] Moreover, a specific verse of the Bible — called for this reason the "neck verse" — was used for the literacy test, and

at all, at least for a first offense.[5] A statute had eliminated any actual referral of lay defendants to the ecclesiastical courts, and the royal courts would impose an alternative punishment such as, depending on the period and the offense, branding, whipping, the pillory, imprisonment, or "transportation" to one of the colonies.[6] Effectively, by the time of the eighteenth century, benefit of clergy — when available — rendered a first felony offense noncapital and subject to judicial discretion in sentencing.

From the sixteenth to the eighteenth centuries, however, Parliament passed a series of statutes making certain felonies punishable by death "without benefit of clergy."[7] A conviction under one of these statutes was equivalent to a mandatory death sentence. Some statutes took away benefit of clergy for the most serious offenses against the person, such as murder and rape. *See* 1 Edw. 6, c. 12, §§ 9, 13 (1547); 18 Eliz. c. 7 (1575-76). But, especially in the late seventeenth and early eighteenth centuries, Parliament stripped benefit of clergy from a long list

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so even illiterate defendants could memorize it to claim the benefit. *See* George W. Dalzell, *Benefit of Clergy in America & Related Matters* 24 (1955) (quoting *Psalms* 51:1: "Have mercy upon me, O God . . . ." (King James)).

[5] *See* 4 Blackstone at *362-63; Langbein, 50 U. Chi. L. Rev. at 37-38.

[6] *See* 4 Blackstone at *362-64; Hall at 115 & n.15; *see also* 1 Leon Radzinowicz, *A History of English Criminal Law and Its Administration*, app. 1, 633 (1948) ("Radzinowicz") (listing punishments for larceny). Branding on the brawn of the thumb was used to indicate that the defendant had already received benefit of clergy once and therefore would not be eligible a second time. *See* Langbein, 50 U. Chi. L. Rev. at 37-38.

[7] For collections of these statutes, see Hall at app., 356-63; 1 Radzinowicz at app. 1, 611-59.

of felonies, some of them newly created by statute. These new capital felonies included shoplifting, *see* 10 Will. 3, c. 12 (1698); destroying a ship to defraud an insurance company, *see* 11 Geo. 1, c. 29, §§ 5, 6 (1724); and bankruptcy fraud, *see* 5 Geo. 2, c. 30, § 1 (1732). A statute even imposed the death penalty upon "any outlandish people calling themselves or being called *Egyptians* . . . [and] any person being fourteen years old, which hath been seen or found in the fellowship of such *Egyptians*,"[8] who remained in England or Wales for more than a month. 1 Matthew Hale, *Historia Placitorum Coronae* *670 (1736) ("Hale") (citing 1 & 2 Phil. & M. c. 4 (1554-55)).

Faced with application of these statutes, the royal courts began to invoke the principle that "penal statutes must be construed strictly," 1 Blackstone at *88, meaning that they would be applied to cases only within their express terms and that those terms would be read narrowly (in some cases, very narrowly). Blackstone gives two examples. One statute took away benefit of clergy if a defendant had been convicted of stealing "horses," but "the judges conceived that this did not extend to him that should steal but *one horse*." *Id.* Another statute made benefit of clergy inapplicable to the stealing of "sheep, *or other cattle*." *Id.* "[T]hese general words, 'or other cattle,' being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep." *Id.* Similarly, in the later case of *The King v. Beaney*, Russ. & Ry. 416, 168 Eng. Rep. 874 (1820), a defendant was found to have stolen two "colts," and the courts found that "as 'colts' were not mentioned, *eo nomine* in the statute,

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[8] Blackstone refers to the targets of this statute as "gypsies," 4 Blackstone at *165, today more properly called Roma.

the judges could not take notice that they were of the horse species," so that Beaney could be convicted only of common law larceny. *Id.* at 416, 168 Eng. Rep. at 874 (citation omitted); *see also The King v. Cook*, 1 Leach 105, 168 Eng. Rep. 155 (1774) (theft of a "heifer," though "clearly proved," could not be punished under a statute forbidding the stealing of a "cow"). In each case, although framed as interpretation of the substantive scope of the statutory prohibition, the strict construction principally worked to limit the application of the mandatory penalty.

The English rule of strict construction also applied to situations in which the interaction of two different statutes, or of a statute with the common law, was doubtful or ambiguous. For example, *Evans & Finch's Case*, Cro. Car. 473, 79 Eng. Rep. 1009 (1638), interpreted a statute denying benefit of clergy to those convicted of robbery from a dwelling house. Although the common law made accessories to robbery equally liable with principals, the statute did not mention accessories, and so the King's Bench held that Finch, who had been convicted as an accessory, was entitled to benefit of clergy. *Id.* at 474, 79 Eng. Rep. at 1009; *see* 1 Hale at *528 (explaining the reasoning in more detail). Similar results were reached in *The King v. Baynes*, 1 Leach 7, 8, 168 Eng. Rep. 106, 106 (1731) (statutory offense of "privately stealing from the person"), *The King v. Sterne*, 1 Leach 473, 474-75, 168 Eng. Rep. 338, 339 (1787) (same), and *The King v. Page & Harwood*, Style 86, 82 Eng. Rep. 550 (1648) (statutory manslaughter by stabbing).[9]

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[9] Additional cases on the treatment of accessories are discussed in the reporter's note to *The King v. Midwinter & Sims*, Fost. 415, 168 Eng. Rep. 90 (1751), which criticizes the result

The English courts' practice of strict construction was motivated in large part by the fatal result of a holding that the benefit of clergy was not available. *See* 2 Hale at *335 (stating that, when a statute has "ousted clergy . . . , it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised within such statutes, for *in favorem vitae & privilegii clericalis* such statutes are construed literally and strictly").

There is evidence, however, that by the late eighteenth century the practice of narrowly construing penal statutes had already begun to rest on more general principles about the appropriately limited role of the courts in construing criminal legislation. In *The King v. Hammond*, 1 Leach 444, 168 Eng. Rep. 324, tried at the Old Bailey in 1787, the court said:

> In all cases . . . so highly penal as the present case is, it is certainly necessary not only to consider the intention of the Legislature, but to bring the offender within the words of the Act of Parliament itself. . . . The Judges . . . are not to consider what the Legislature would have done in certain cases, but to look at the words they have used, and to construe them according to the meaning which it is most likely they entertained at the time the subject was under their consideration.

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in that case as inconsistent with the general principle and adds that "[c]ases without number might [be] cited to shew how extremely tender the judges in all times have been in the construction of Acts, which take away clergy." *Id.* at 419, 168 Eng. Rep. at 92; *see also* Hall at 118-26 (collecting and discussing more cases); 1 Radzinowicz at app. 2, 660-98 (same).

Id. at 446, 168 Eng. Rep. at 325. This case reflects the more modern concern of the courts that the legislature's role was to define a crime and its potential punishment and the judiciary's role was to ensure that the definition clearly applied to the defendant.

B. This Court Has Employed the Rule of Lenity To Protect the Separation of Powers and the Principle of Legality

When the courts of the United States adopted the rule of lenity, they rested it primarily on concerns about the separation of powers and the principle of legality (which holds that punishment must be imposed only pursuant to law), rather than concerns about erroneous application of the death penalty.[10] In *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820) (Marshall, J.), the Court adopted the "rule that penal laws are to be construed strictly," alluding to its English history by observing that the rule "is perhaps not much less old than construction itself." *Id.* at 95. *Wiltberger* made express what the English courts had largely hinted at: that the rule of lenity is founded both on "the tenderness of the law for the rights of individuals; *and* on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Id.* (emphasis added).[11] Although these goals would not justify a

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[10] The Congress of 1790, in "An Act for the Punishment of certain Crimes against the United States," provided that the benefit of clergy should not apply in the federal courts, so this Court never had occasion to apply the rule of lenity in its original context. *See* Act of Apr. 30, 1790, ch. 9, Preamble, § 31, 1 Stat. 112, 112, 119.

[11] The manslaughter statute interpreted in *Wiltberger* did not provide for capital punishment, *see* 18 U.S. (5 Wheat.) at 93-94, and Chief Justice Marshall did not invoke the presumption *in favorem vitae* in support of the rule of lenity.

court in "defeat[ing] the obvious intention of the legislature," this "intention . . . is to be collected from the words [the legislature] employ[s]," and so, "[t]o determine that a case is within the intention of a statute, its language must authorise [a court] to say so." *Id.* at 95-96.[12]

Justice Holmes's opinion for the Court in *McBoyle v. United States*, 283 U.S. 25 (1931), provides another leading explanation of the rule of lenity. Justice Holmes wrote that, before imposing a criminal punishment, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 27. *McBoyle* makes clear, however, that the rule is not based on any unrealistic assumption that "a criminal will carefully consider the text of the law before he murders or steals." *Id.*[13] Instead, the rule of lenity ensures that courts do not punish "because it may seem to [them] that a similar policy applies" to acts not expressly covered by a statute, "or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *Id.* This "fair warning" function of the rule is closely tied to the separation-of-powers justification given by Chief Justice Marshall in *Wiltberger*. It is less concerned with actual notice to particular defendants, and

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[12] *See also* Charles de Montesquieu, *The Spirit of Laws* 80 (1794 ed.) ("In republics the very nature of the constitution requires the judges to keep to the letter of the law. Here there is no citizen against whom a law can be interpreted, in cases where his honour, property, or life is concerned.").

[13] *See also Bell v. United States*, 349 U.S. 81, 83-84 (1955) (the rule of lenity does not "assume that offenders against the law carefully read the penal code before they embark on crime").

more with the certainty and predictability that the justice system as a whole derives from ensuring that statutes providing for criminal punishments contain clear statements rather than calling for judicial extrapolation.

Many other decisions of this Court similarly emphasize the role of plain statutory language in monitoring the boundary between the legislative and judicial spheres in criminal punishment. In *Fasulo v. United States*, 272 U.S. 620 (1926), for instance, the Court wrote that, in construing a criminal statute, "it is not permissible for the court to search for an intention that the words themselves do not suggest." *Id.* at 628. In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952), the Court explained that, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 221-22. The Court's reference to "what conduct . . . has [been] made a crime" meant not the difference between conduct that is criminalized and that which is not, but to a scope-of-punishment issue — the "unit of prosecution," which determines how many counts may be charged against the defendant for a single course of conduct. In *Bell v. United States*, again addressing the scope of punishment rather than the definition of crime, the Court addressed the number of counts that could be laid for a single act that endangered multiple victims, adding that the rule of lenity applies when "Congress leaves to the Judiciary the task of imputing to Congress an undeclared

will." 349 U.S. at 83-84.[14] This Court also has said recently that the rule of lenity asks whether, in a criminal statute, "'Congress has spoken in clear and definite language,'" citing the concern that "expansion of the law's coverage must come from Congress, and not from the courts." *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)).

This requirement for a clear statutory statement to guide decisions of whether and how much to punish also safeguards the "principle of legality," which requires that punishment be dictated by "law in existence at the time the conduct complained of occurred," and "that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits." Herbert L. Packer, *The Limits of the Criminal Sanction* 93 (1968) ("Packer"); *see also United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997). Legality is protected in federal criminal law both by the Constitution's Ex Post Facto and Due Process Clauses and by the rule of lenity. *See Lanier*, 520 U.S. at 266-67; Packer at 95 (observing that lenity "may perhaps be viewed as something of a junior

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[14] *See United States v. Aguilar*, 515 U.S. 593, 600 (1995) (giving both "deference to the prerogatives of Congress" and *McBoyle*'s concern for "fair warning" as reasons for the Court's "traditional[] . . . restraint in assessing the reach of a federal criminal statute"); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985) (citing "[d]ue respect" for Congress as the justification for the rule, and quoting *Wiltberger*); *see also Bifulco v. United States*, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (observing that, "[p]articularly in the administration of criminal justice, a badly drawn statute places strains on judges," but warning against "[t]he temptation to exceed our limited judicial role and do what we regard as the more sensible thing").

version of the vagueness doctrine"). Uncertainty in the interpretation of penal statutes, or judicial expansion of them beyond their plain language, erodes legality by removing the required constraints on judicial discretion. Because of the importance of avoiding this danger, "[c]ourts have . . . traditionally been quite insistent on maintaining a high standard of compliance with th[e] policy of clear statement" embodied by the rule. Packer at 95.[15]

To be sure, the rule of lenity does not preclude the use of the "traditional tools of statutory construction." *Caron v. United States*, 524 U.S. 308, 316 (1998) (citing *United States v. Shabani*, 513 U.S. 10, 17 (1994)). This Court has always made clear, however, that, when called upon to clarify a criminal statute, these traditional tools of statutory construction must meet a high burden: if, after consulting them, "a reasonable doubt persists about a statute's intended scope," then the traditional presumption takes effect. *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992) (plurality opinion) (internal quotation marks omitted).[16] There is no precise way to quantify exactly the "weight" of the "judicial thumb on . . . the scales" imposed by the rule of lenity, Antonin

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[15] *See* Cesare Beccaria, *An Essay on Crimes and Punishments* 16 (4th ed. 1775) ("The disorders, that may arise from a rigorous observance of the letter of penal laws, are not to be compared with those produced by the interpretation of them.").

[16] *See R.L.C.*, 503 U.S. at 307-08 (Scalia, J., concurring in part and concurring in the judgment) (disagreeing with the *R.L.C.* plurality's reliance on "legislative history" and "motivating policies" but agreeing with its "reasonable doubt" criterion) (internal quotation marks omitted); *Moskal v. United States*, 498 U.S. 103, 108 (1990) (same "reasonable doubt" standard); *see also United States v. Corbett*, 215 U.S. 233, 242 (1909); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 395-96 (1868).

Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990), but the rule's deep roots and crucial purpose establish that the weight should be significant. As the line from *Evans & Finch's Case* through *Wiltberger* to the modern cases shows, judges have often found the rule of lenity, and its function of protecting the separation of powers and the principle of legality, decisive in the interpretation of criminal statutes.[17]

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[17] *Muscarello v. United States*, 524 U.S. 125 (1998), includes language suggesting that only a "grievous ambiguity or uncertainty" will trigger the rule of lenity. *Id.* at 138-39 (internal quotation marks omitted; quoting, among others, *Chapman v. United States*, 500 U.S. 453, 463 (1991)); *see also Huddleston v. United States*, 415 U.S. 814, 831 (1974). Conceivably, the term "grievous" could indicate a lightened "thumb on the scales" — a heightened degree of ambiguity as necessary to trigger lenity, especially in contrast with older cases that require lenity in the absence of a "clear and definite" statement, *e.g.*, *Universal C.I.T.*, 344 U.S. at 221-22. But *Muscarello* and its short line of predecessors should not be read to depart from the traditional standard. These cases show no intent to change a centuries-old rule and contain additional language that is more consistent with the clear-statement requirement of the properly applied rule of lenity. *See, e.g.*, *Muscarello*, 524 U.S. at 139 (reasoning that the conduct there at issue fell within the "generally accepted contemporary meaning" of the statutory language); *Chapman*, 500 U.S. at 463-64 (quoting *Moskal*'s formulation that lenity applies in cases of "reasonable doubt"). Moreover, this Court has in more recent cases reaffirmed that the rule of lenity is a requirement that Congress speak in "clear and definite language." *Scheidler*, 537 U.S. at 409 (internal quotation marks omitted). The "grievous ambiguity" formulation, if read to require a heightened degree of ambiguity, would be in considerable tension with the "reasonable doubt" test applied in such cases as *R.L.C.* and *Moskal*. This case presents a good opportunity to review this Court's many statements about the rule of lenity and to clarify that triggering ambiguity need not be "grievous," except perhaps in the sense that any uncertainty

In addition, as with other background principles of statutory interpretation, the rule's long history alone reinforces its importance: because Congress "presumably has [the rule] in mind when it chooses its language," *id.* at 583, the absence of clear language in a statute that might be read to expose individuals to additional liability suggests that Congress did not mean to achieve that result.

C. The Rule of Lenity Should Apply to Mandatory Minimum Sentences Today

The interpretation of a mandatory minimum sentencing provision squarely implicates the history and policies underlying the rule of lenity. Accordingly, the Court should give that rule very serious consideration in interpreting those provisions.

This Court's precedents firmly establish that the rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco*, 447 U.S. at 387; *see also Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating that the rule applies to any question of statutory interpretation that would "increase the penalty that [the statute] places on an individual"). These holdings make sense from a historical perspective, given the rule's roots in cases interpreting statutes that enhanced sentences for crimes already punishable at common law. They also make sense in light of the rule's theoretical grounding in the principle of legality.[18] Because the rule of

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about the reach of a criminal statute raises grievous concerns for the rule of law.

[18] *Cf. Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) (stating that *ex post facto* laws include "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed").

lenity does not rest on an "assum[ption] that offenders against the law carefully read the penal code," *Bell*, 349 U.S. at 83-84, but instead on a broader imperative that the criminal laws be clear, it has equal force in decisions whether to punish conduct at all, and, if so, how much punishment to inflict.

A mandatory minimum sentencing statute, moreover, raises with particular force the concerns that underpin the rule of lenity. Such a statute represents a legislative abrogation of the "uniform and constant . . . federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as . . . unique." *Koon v. United States*, 518 U.S. 81, 113 (1996), *quoted in Gall v. United States*, 552 U.S. ---, 128 S. Ct. 586, 598 (2007).[19] Every mandatory minimum provision is a congressional directive that a greater risk of injustice in many cases will be tolerated in order to serve a perceived social need for greater deterrence or incapacitation of a class of offenses or offenders. This kind of tradeoff is within legislative competence, subject to constitutional constraints, but it is not part of the judicial role. *Cf. Williams v. United States*, 503 U.S. 193, 205 (1992) ("[E]xcept to the extent *specifically* directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)) (emphasis added).

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[19] *See also Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum.").

Accordingly, the courts should read such statutes narrowly to ensure that they are implementing a decision that the legislature has actually made, rather than guessing about an unclear legislative intent. *See Busic v. United States*, 446 U.S. 398, 408-09 (1980) (refusing to interpret a sentencing enhancement based on the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

Indeed, in one sense, the argument for reading a mandatory minimum narrowly is stronger than the concern that motivated the English courts. Even after this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines system promotes "uniformity [as] an important goal of [federal] sentencing." *Kimbrough v. United States*, 552 U.S. ---, 128 S. Ct. 558, 573 (2007). And the existence of this system, together with judicial discretion guided by 18 U.S.C. § 3553(a), ensures that the policy considerations that underlie mandatory minimums will be taken into account even in cases to which the minimums themselves do not apply. For example, if the mandatory minimum is held not to apply in this case, the sentencing court will be required to take Burgess's prior state conviction into account for the light it sheds on his "history and characteristics," 18 U.S.C. § 3553(a)(1), to consider its seriousness and the need for deterrence, *id.* § 3553(a)(2)(A), (B), and to balance it against the other factors present in the case. There is therefore no need for the courts to stretch the language of § 841(b)(1)(A) to ensure that prior convictions are given due weight and much reason to read that provision narrowly to ensure that the significance of prior convictions is not exaggerated beyond what Congress's clear intent requires.

Moreover, the Sentencing Reform Act of 1984 itself, including its overriding principle of parsimony (requiring a sentence "not greater than necessary," *id.* § 3553(a)), is to be applied at every federal sentencing unless "otherwise *specifically* provided." *Id.* § 3551(a) (emphasis added). This mandate reinforces the traditional requirement that a departure from discretionary sentencing be justified by an unambiguous statement of congressional intent.

A robust rule of lenity applied to mandatory minimum sentencing provisions also will promote clarity and predictability in interpreting those provisions. Congress has passed and continues to consider many such provisions.[20] This Court has felt it necessary to grant review in a significant number of cases to resolve circuit splits in the interpretation of these mandatory minimums.[21] Proper application of the rule of lenity can provide helpful clarity and reduce litigation over the meaning of such statutes. Moreover, uncertainty in the interpretation of mandatory minimums can impede the plea negotiations that today help resolve a large majority of the federal criminal caseload. These negotiations will proceed more quickly and smoothly if the law that governs criminal punishment is clear. *See Holloway v. United States*, 526 U.S. 1, 22 (1999) (Scalia, J., dissenting) (citing the "*in terrorem* effect" of expanded

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[20] *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(a)(1), 120 Stat. 587, 602; Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); PROTECT Act, Pub. L. No. 108-21, § 103(b), 117 Stat. 650, 653 (2003).

[21] *See, e.g., Begay v. United States*, No. 06-11543 (argued Jan. 15, 2008); *Logan v. United States*, 552 U.S. ---, 128 S. Ct. 475 (2007); *James v. United States*, 550 U.S. ---, 127 S. Ct. 1586 (2007).

liability on "a modern federal criminal-law system characterized by plea bargaining" to support the rule of lenity).

Finally, the consequences of triggering a mandatory minimum can be severe. Although not as severe as the parliamentary statutes that led to the rule's English predecessor, mandatory minimums nevertheless have a dramatic impact on individual liberty in many cases, and this is the kind of consequence that courts for centuries have given reasonable weight in the construction of statutes. *See Callanan v. United States*, 364 U.S. 587, 596 (1961) (when "applicable statutory provisions [are] found to be unclear . . . , the rule of lenity [is] utilized, *in favorem libertatis*, to resolve the ambiguity"). The Court has approved Judge Friendly's observation that the rule of lenity embodies an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Henry J. Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," *in Benchmarks* 196, 209 (1967), *quoted in United States v. Bass*, 404 U.S. 336, 348 (1971). It should do so again today.

II. THE RULE OF LENITY REQUIRES REVERSAL IN THIS CASE

Applied properly to this case, the rule of lenity compels reversal. As petitioner's brief shows, the Controlled Substances Act can be read harmoniously only if a prior "felony drug offense" within the meaning of § 841(b)(1)(A) is defined in accord with both § 802(13) and § 802(44). This reading best accords with the text of the statute and with the ordinary usage of the English language. The arguments presented by the court below and by the Government for the harsher reading of § 841(a)(1) fail to overcome

this more natural reading and certainly cannot eliminate the "reasonable doubt" (*R.L.C.*, 503 U.S. at 305-06 (plurality opinion)) that calls the rule of lenity into play.

To begin, as the Court should, with the text of the statute, § 802(13) says plainly that "[t]he term 'felony' means . . . [an] offense classified by applicable Federal or State law as a felony." Any reading of the statute that did not incorporate this requirement into the meaning of "felony drug offense" would fail to give § 802(13) full application according to its language, because, when used as part of the phrase "felony drug offense," the term "felony" would *not* refer to an offense so classified. Such a reading would make the provisions of the Controlled Substances Act internally inconsistent, which is not a promising beginning for an argument that must show that the statute contains no ambiguity. *Cf. United States v. Turkette*, 452 U.S. 576, 580 (1981) (observing that the process of statutory construction involves "deal[ing] with" any "internal inconsistencies in the statute").

This reading is reinforced by this Court's "assumption that the ordinary meaning of [statutory] language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (internal quotation marks omitted). Congress, of course, is "free to be unorthodox" and may "define [statutory terms] in an unexpected way" — but, to do so, it must "tell us so." *Lopez v. Gonzales*, 549 U.S. ---, 127 S. Ct. 625, 630 (2006). This logic applies to the relationship between noun and adjective in the phrase "felony drug offense" — such an offense would, in ordinary usage, be a "felony." Congress could, to be sure, have

created a statutory scheme in which a felony drug offense was not necessarily a felony, or indeed one in which the two categories were mutually exclusive. This statute, however, does not speak directly to the relationship between § 802(13) and § 802(44). Accordingly, because a situation in which a felony drug offense is not a felony is "just what the English language tells us not to expect," this Court should be "very wary" before reaching that result. *Id.*

The contrary arguments presented and discussed by the court below and by the First Circuit in *United States v. Roberson*, 459 F.3d 39 (1st Cir. 2006), *cert. denied*, 549 U.S. ---, 127 S. Ct. 1261 (2007), rely on various canons and maxims of statutory construction. In this context, it is worth remembering Justice Frankfurter's caution that "[g]eneralities about statutory construction . . . are not rules of law but merely axioms of experience." *Universal C.I.T.*, 344 U.S. at 221; *accord Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). To begin with, the court below relied on this Court's statement in *Colautti v. Franklin*, 439 U.S. 379 (1979), that "a statutory definition 'which declares what a term means . . . excludes any meaning that is not stated.'" Pet. Br. App. 7a (quoting 439 U.S. at 392 n.10) (ellipsis in original). This undoubtedly accurate statement does not resolve the problem, but only restates it, because this case, unlike *Colautti*, features two statutory definitions rather than only one. If § 802(44) excludes from the term "felony drug offense" any meaning other than § 802(44) itself provides, then § 802(13) should likewise exclude from the term "felony" any meaning other than § 802(13) *itself* provides, and the word "felony" remains part of the phrase "felony drug offense." Recognizing Congress's ability to define

words does not help to resolve the question, in an individual case, of how Congress actually chose to define them.

The canon that "specific statutory language should control more general language when there is a conflict between the two," *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002), relied upon by the Government in the First Circuit and in its brief in opposition, *see Roberson*, 459 F.3d at 55 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992)); Br. in Opp. 12 (same), likewise fails to remove ambiguity from the statute. As the First Circuit itself acknowledged in rejecting this argument, the canon applies only where a conflict exists within the text of the statute. *See Roberson*, 459 F.3d at 55; *see also National Cable & Telecomms.*, 534 U.S. at 336 (canon inapplicable where "there is no conflict"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.05, at 105 (5th ed. 1992) (canon applies only "[w]here there is inescapable conflict"). In this case, however, only the Government's construction creates a conflict between § 802(13) and § 802(44). Petitioner's construction does not, and it is preferable for that reason alone.

Further, any attempt to apply to the Controlled Substances Act the canon that the specific trumps the general deepens, rather than resolves, the ambiguity created by the Government's interpretation. As the D.C. Circuit correctly observed in *United States v. West*, 393 F.3d 1302 (D.C. Cir. 2004), "the word 'felony,' as used in the enhancement provisions of the Act to refer to prior convictions, always pertains explicitly to drug offenses." *Id.* at 1314.[22] It is there-

[22] This is true not only for the enhancement provisions themselves, but also for a large majority of all uses of the term

fore wrong to say that either definition is more specific than the other: both refer to felony drug offenses. The First Circuit, and the Government, have objected that the word "felony" is used in the statute for purposes other than to describe a felony drug offense. *See Roberson*, 459 F.3d at 53-54; Br.

"felony" in the Controlled Substances Act as a whole. For example, 21 U.S.C. § 824(a)(2) refers to a "felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical"; any such felony would be a "felony drug offense" as defined by § 802(44). *Accord id.* §§ 841(b)(2) ("felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances"), 841(b)(1)(A), (B), (C), (D) ("felony drug offense"), 841(e) ("felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical"), 843(b) ("felony under any provision of this subchapter or subchapter II of this chapter"), 843(d)(1) ("felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances"), 843(d)(2)(B) ("felony under any other provision of this subchapter or subchapter II of this chapter"), 843(e) ("felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical"), 848(c)(1) ("any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony"), 848(e)(1)(B) ("felony violation of this subchapter or subchapter II of this chapter"), 853(d) ("felony under this subchapter or subchapter II of this chapter"), 862a(a) ("felony [under] the law of the jurisdiction involved . . . which has as an element the possession, use, or distribution of a controlled substance"); *see also id.* § 881(a)(9) (1994) (amended in relevant part in 1996; formerly referring to "a felony provision of this subchapter or subchapter II of this chapter"); *id.* §§ 960(b)(1), (2), (3), 962(b) (in penalty provisions of adjacent Controlled Substances Import and Export Act; "felony drug offense").

in Opp. 9. Inspection, however, shows that the three relevant references apply only to *federal* felonies, so that § 802(13)'s incorporation of state law is irrelevant to them.[23] Accordingly, while the word "felony" is used in these three parts of the statute, the definition of "felony" contained in § 802(13), which is the relevant subject for the specificity analysis, is not.

Section 802(44)'s enactment history also does not support the inference that it was intended to define felony drug offenses that were not necessarily felonies, as the Government has argued. *See* Br. in Opp. 11-12. Before 1994, § 841(b)(1)(A) contained a section-specific definition of "felony drug offense" that included a requirement that any prior non-federal offense be a felony under state law. *See* Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, tit. VI, § 6452(a), 102 Stat. 4181, 4312, 4371. In 1994, Congress removed that definition and enacted § 802(44) as it now stands (then numbered § 802(43)). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105(c)-(d), 108 Stat. 1796, 1987-88. If consistent with the inference that Congress meant to remove the state-law requirement from the operation of § 841(b)(1)(A), this sequence nevertheless equally supports the inference that, with § 802(44) now located alongside § 802(13), Congress considered the

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[23] The provisions are 21 U.S.C. § 878(a)(3), which authorizes arrests for a "felony, cognizable under the laws of the United States," and former § 848(q)(5) and (q)(6), repealed in 2006, which required counsel in capital cases to have "experience in the actual trial of felony prosecutions," or the "handling of appeals . . . in felony cases," in the specific courts in which those capital cases were to be tried or appealed, *id.* § 848(q)(5), (6) (2000). Because the courts were federal ones, the felonies would also have been federal.

extra language unnecessary for both requirements to apply. After all, if Congress had the intent the Government now attributes to it, it also could easily have added express language to § 802(44) stating that a felony drug offense need not be a felony under state law. The Government's indirect extrapolation of congressional intent thus falls far short of the "clear and definite language" that this Court's precedents require before invocation of the rule of lenity. *Scheidler*, 537 U.S. at 409; *see United States v. Laub*, 385 U.S. 475, 487 (1967) ("Crimes are not to be created by inference.").

In summary, the arguments for a broad construction of § 841(b)(1)(A) fail because they neglect this Court's instructions that legislative "intention . . . is to be collected from the words [the legislature] employ[s]," *Wiltberger*, 18 U.S. (5 Wheat.) at 95, and that courts may not "search for an intention that the words [of a criminal statute] themselves do not suggest," *Fasulo*, 272 U.S. at 628. No inferences that can be drawn from the structure or history of the statute are strong enough to establish a "clear and definite" conclusion (*Scheidler*, 537 U.S. at 409) that greater punishment is justified. To affirm in this case would disserve a judicial tradition that predates the English Civil War. It also would increase the danger that harsh mandatory minimums will be applied in ways that Congress never considered and did not authorize. Therefore, this Court should adopt "the safer construction of so penal a statute," *Howard's Case*, Fost. 77, 79, 168 Eng. Rep. 39, 39 (1751) (reporter's note), reverse, and in doing so reaffirm the importance of the rule of lenity in the construction of sentencing provisions.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted,

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